(28,268)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 321.

JOHN P. KLINE, MILTON WINHAM, AND PAUL G. HUCKINS, AS THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20, OF THE CITY OF TEXARKANA, ARKANSAS, PETITIONERS,

vs.

BURKE CONSTRUCTION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from U. S. circuit court of appeals	a	1
Citation and waiver of service	1	1
Caption to transcript from U. S. district court	3	3
Bill of complaint	4	4
Memorandum of clerk of district court	11	9
Answer	11	10
Decree of the district court, August 30, 1920	22	19
Statement of the evidence	24	20
Certificate of judge to statement of the evidence	24	21
Complaint at law in the district court, western district of Arkansas, in the case of Burke Construction Company *vs.* Paving District No. 20, etc., *et al.*, No. 439	24	21
Pleadings and proceedings at law in the district court, western district of Arkansas, in the case of Burke Construction Company *vs.* Board of Improvement of Paving Improvement District No. 20, etc., *et al.*, No. 439	37	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1921.

	Original.	Print
Second amended and substituted complaint at law	37	3
Answer and counter claim of defendant, Board of Improvement, etc.	64	5
Exhibit A—Agreement between the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, and the Burke Construction Company, February 19, 1918	107	8
Extension of bond of Burke Construction Company	110	9
B—Agreement between the Board of Improvement, etc., and the Burke Construction Company, January 7, 1919, extending time for completion of work in Paving Improvement District No. 20, Texarkana, Arkansas	110	9
Agreement of bondsmen of the Burke Construction Company to extension of time to complete the street improvements in Paving Improvement District No. 20 of Texarkana, Arkansas	113	9
C—Agreement between the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, and the Burke Construction Company, April 12, 1919	114	9
D—Statement of defective and rejected work in Paving Improvement District No. 20, Texarkana, Arkansas	116	9
Demurrer and reply to counter claim	116	9
Order granting plaintiff leave to amend summons and granting the Paving Improvement District No. 20 time to further plead, etc.	120	10
Order granting plaintiff leave to amend second amended and substituted complaint and cause dismissed as to John P. Kline *et al.*	120	10
Order overruling motion of defendant to require plaintiff to paragraph and number the paragraphs of its complaint	121	10
Order requiring plaintiff to give bond for costs	121	10
Demurrer to bill of complaint overruled; motion to strike out certain parts of the complaint overruled; motion to require plaintiff to make its complaint more definite and certain overruled	122	10

	Original.	Print.
Motion of defendant to transfer cause to the equity side of the docket overruled; plaintiff's demurrer to defendant's counter claim overruled	122	102
Jury impaneled, trial July 20, 1920	123	103
Trial, July 21, 1920	123	103
Trial, July 22, 1920	123	103
Trial, July 23, 1920	124	103
Trial, July 24, 1920	124	104
Trial, July 26, 1920	124	104
Trial, July 27, 1920	124	104
Trial, July 28, 1920	125	104
Trial, July 29, 1920; renewed motion of defendant to transfer cause to the equity side of the docket overruled; motion of defendant for special findings of facts by the jury granted; jury discharged, etc	125	104
Transcript of record from the chancery court of Miller County, Arkansas, in the case of John P. Kline *et al.*, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, *vs.* The Burke Construction Company *et al.*, No. 692	126	105
Bill of complaint	126	106
Exhibit B—Agreement between the Board of Improvement, etc., and the Burke Construction Company, February 19, 1918	134	112
Extension of bond of Burke Construction Company	137	114
C—Agreement between the Board of Improvement, etc., and the Burke Construction Company, January 7, 1919, extending time for completion of work in Paving Improvement District No. 20, Texarkana, Arkansas	138	115
Agreement of bondsmen of the Burke Construction Company to the extension of time to complete the street improvement in Paving Improvement District No. 20 of Texarkana, Arkansas	140	117
D—Inventory of machinery, etc., on line of the work in Improvement District No. 20 belonging to the Burke Construction Company and taken in custody by the Improvement District	141	118
Summons and return of sheriff of Sebastian County, Arkansas	143	120

	Original.	Print.
Summons and return of sheriff of Pulaski County, Arkansas	144	120
Summons and return of sheriff of Pulaski County, Arkansas	145	121
Summons and return of sheriff of Miller County, Arkansas	146	122
Petition for removal of cause to Federal court	147	122
Bond on removal	151	126
Order of removal	152	127
Clerk's certificate to transcript from chancery court	153	128
Order of the district court, western district of Arkansas, in the case of John P. Kline *et al.*, as the Board of Improvement, etc., *vs.* The Burke Construction Company *et al.*, remanding cause to the State court	154	129
Pleadings and proceedings in the chancery court of Miller County, Arkansas, in the case of John P. Kline *et al.* as the Board of Improvement, etc., *vs.* The Burke Construction Company *et al.*	154	129
Record entry of the filing of order of the U. S. district court remanding cause	154	129
Order overruling motion to require plaintiff to set out in separate counts the alleged various causes of action	155	130
Order overruling motion to make complaint more certain	155	130
Demurrer to complaint sustained in part and overruled in part	155	130
Order that the parties proceed with the taking of depositions, etc	156	131
Clerk's certificate to proceedings in the chancery court	156	131
Joint demurrer of M. C. Burke *et al.* to the complaint	157	132
Answer of Burke Construction Company *et al.*	158	133
Answer of the United States Fidelity & Guaranty Company	166	139
Amendment to answer of the United States Fidelity & Guaranty Company	175	146
Petition for and order allowing appeal	177	148
Assignment of errors	181	151
Bond on appeal	182	152
Precipe for transcript	183	153
Clerk's certificate to transcript	184	154
Application of Burke Construction Company for a preliminary injunction pending an appeal	184	154
Response to application for a preliminary injunction	188	157
Order of the U. S. circuit court of appeals granting preliminary injunction	189	158

	Original.	Print.
Injunction bond of the Burke Construction Company	191	160
Appearance of Mr. Vincent M. Miles as counsel for appellant	193	161
Appearance of Mr. James B. McDonough and Mr. James D. Head as counsel for appellant	193	161
Appearance of counsel for appellees	194	162
Motion of appellees to modify injunction of United States circuit court of appeals, etc	194	162
Notice of motion of appellees to modify injunction of circuit court of appeals, etc	202	167
Response of appellant to motion to modify injunction	203	167
Notice and motion of appellees to advance and dismiss appeal	205	168
Order of submission of motions to advance and dismiss and to modify injunction	206	170
Order denying motions of appellees to advance and dismiss, etc., and postponing consideration of motion to modify order of October 2, 1920	207	170
Order of submission	208	171
Opinion, U. S. circuit court of appeals	209	171
Decree, U. S. circuit court of appeals	222	181
Præcipe for transcript on application to Supreme Court U. S. for a writ of certiorari	223	182
Clerk's certificate to transcript	224	182
Writ of certiorari and return	225	183

a Pleas and Proceeding in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1920, of said Court.

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the ninth day of September, A. D. 1920, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Burke Construction Company was Appellant and John P. Kline, et al., as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (*Citation and Waiver of Service.*)

In the District Court of the United States for the Western District of Arkansas, Texarkana Division.

No. 47. Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff in Error,

vs.

JOHN P. KLINE, MILTON WINHAM, and PAUL G. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, Defendants in Error.

To John P. Kline, Milton Winham, and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas:

You and each of you are hereby cited and admonished to be and appear in the Circuit Court of Appeals of the Eighth Circuit at the city of St. Louis, State of Missouri within 30 days after this citation bears date, pursuant to an appeal filed in the clerk's office of the United States District Court for the Western District of Arkansas,

Texarkana Division, in a cause wherein the Burke Construction Company is plaintiff and John P. Kline, Milton Winham, and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas are defendants, being number 47 Equity, in said United States District Court for the Western District of Arkansas, Texarkana Division in which said cause the said Burke Construction Company is plaintiff and the parties above named are defendants, and in which the Burke Construction Company filed a bill of complaint on behalf of itself, praying that the defendants be restrained and enjoined from the further prosecution of a suit in equity in the state Chancery court of Miller County, State of Arkansas. The bill of complaint of the Burke Construction Company was filed in said Texarkana Division of said United States District Court on the 24th day of August, 1920, and said Burke Construction Company through its counsel appeared before the Honorable F. A. Youmans, Judge of the said United
2 States District Court in the city of Fort Smith, on the 30th day of August, 1920, and then and there presented its application for a temporary injunction and restraining order. At the same time the defendants, through their counsel, appeared and resisted the granting of said restraining order. The court denied the prayer of the Burke Construction Company and refused to grant a temporary injunction and the Burke Construction Company duly excepted to the action of the court in refusing to grant said injunction and restraining order, and the Burke Construction Company duly appealed from the interlocutory order denying said relief.

You and each of you are therefore admonished and cited to appear and show cause, if any there be, why the judgment and interlocutory order and decree rendered in said cause, refusing and denying the prayer of the Burke Construction Company, should not be corrected and set aside by the Circuit Court of Appeals of the Eighth Circuit and an order and decree entered by said Circuit Court of Appeals of the Eighth Circuit, granting the relief prayed for by said Burke Construction Company in said bill of complaint and to show why speedy justice should not be done the appellant, the said Burke Construction Company as prayed for.

You are further admonished and advised that the Burke Construction Company will on the 7th day of September, 1920 apply to the Circuit Court of Appeals in the city of Denver state of Colorado and will then and there present its appeal herein and pray the Circuit Court of Appeals to reverse the interlocutory order made by the Honorable F. A. Youmans, and will then and there pray the Circuit Court of Appeals, upon proper security being given, to grant a temporary restraining order, restraining said defendants from prosecuting their case in the Chancery Court, of Miller County, State of Arkansas.

Witness the Honorable F. A. Youmans, Judge of the United States District Court for the Western District of Arkansas, Texarkana Division, this 3rd day of September 1920.

FRANK A. YOUMANS,
Judge.

3 *Waiver of Service of Citation.*

Come the appellees, John P. Kline, Milton Winham, and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the city of Texarkana, Arkansas, and hereby waive the service of the above and foregoing citation this — day of —, 1920.

—— ——,
—— ——,
—— ——,
By —— ——,
—— ——,
Their Attorneys of Record.

(*Western Union Telegram.*)

Received at No. 14 South 6th St., Ft. Smith, Ark.
344DA X 24 Blue 3 Ex.

Texarkana, Ark., 439 P., Sep. 3, 1920.

William S. Wellshear, 187, 300, No. 17, Clerk U. S. District Court, Ft. Smith, Ark.:

Board of Improvement District Number Twenty Waives Service of citation in case Burke Construction Co. vs. Board number forty seven. Equity.

FRANK F. QUINN,
Atty. for Board.

5P.

Endorsed: Filed in the District Court on September 3, 1920.

District Court of the United States, Western District of Arkansas, Texarkana Division.

No. 47. Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

JOHN P. KLINE, MILTON WINHAM and PAUL G. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, Defendants.

RECORD OF PROCEEDINGS IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION, IN THE ABOVE-ENTITLED CAUSE:

4 *Bill of Complaint.*

Filed in U. S. District Court August 24, 1920.

Comes the Plaintiff, The Burke Construction Company, and for cause of complaint in equity in this court, and for cause of action against the defendants, the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, Milton Winham, John P. Kline, and Paul G. Huckins, and their agents and representatives state as follows:

The plaintiff, the Burke Construction Company is a corporation organized and existing under the laws of the State of Missouri, and under the laws is a citizen and resident of the said State of Missouri. The Defendant, the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, is a corporation organized for the purpose of paving streets and is under the laws of the state of Arkansas a body corporate and politic and in law has its residence and place of business at Texarkana Arkansas. The defendants, Milton Winham, Paul G. Huckins and John P. Kline constitute and are members of the Board of Improvement of said Paving Improvement District. Each and every one of said defendants, and their agents, attorneys and representatives are citizens and residents of the County of Miller, State of Arkansas, and are within the Western District of Arkansas and Texarkana Division thereof.

This suit is of a civil nature and the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. The Plaintiff herein alleges that on the 16th day of February, 1920 this plaintiff brought a suit in [th-] United States District Court for the Western District of Arkansas, Texarkana Division, which said suit was brought to recover the sum of $85,250.84. The cause of action set forth in said suit was a breach of the contract by the defendants herein. The contract upon which said suit was brought was a contract between the Burke Construction Company and the Board of

Improvement of Paving Improvement District Number Twenty of the city of Texarkana. Said contract was duly entered into on the 29th day of November, 1916. Under said contract the Burke Construction Company agreed to pave certain streets in the town of Texarkana, under a proposal made by the Burke Construction Company on October 30, 1916. The plaintiff herein brought said suit at law and hereto attaches and makes a part hereof a copy of the complaint in said suit at law. After said original suit was brought the plaintiff herein amended said complaint and in the final amended complaint asked for damages for breach of contract by the
5 defendants in this action exceeding the sum of $100,000.00. The defendants in this action appeared in said action in this court *and* on the law side of the docket and filed numerous motions and demurrers to the complaint, some of which were sustained and the complaint amended and some of which were overruled, finally resulting in said defendants filing in this court on the law side and in said suit numbered 439 Law an answer and across complaint. The said answer and cross complaint was filed on the 2 day of July 1920. The Plaintiff herein attaches to this complaint and makes the same a part thereof a copy of said answer and cross complaint. By orders duly made in said cause numbered 439 the same was set down for a hearing before this court on the 20th day of July 1920. On that day the said cause came on for trial upon the complaint of the plaintiff herein alleging a breach of the contract by the defendants herein, and also there came on for trial in the same cause the cross complaint of the defendants in this cause in which cross complaint the said defendants alleged a breach of said contract by this plaintiff. A jury was impaneled in said cause and more than a week was consumed in the introduction of testimony and in the trial of said cause. The plaintiff in this action went to great expense to bring witnesses to said court and went to great expense in the trial of said cause, upon the issues joined in the complaint and the cross complaint. There were eleven jurors on the jury that tried said cause, and the court in the trial of said cause submitted the issues to the jury made by the complaint and the answer thereto and the cross complaint and the answer to the cross complaint. This plaintiff answered said cross complaint and denied the allegations therein in so far as they alleged a breach of that contract by this plaintiff. This plaintiff hereto attaches and makes a part hereof the answer to said cross complaint. Upon the issues thus joined a trial was had as thus stated and said trial resulted in a disagreement by the jury and no verdict was returned. The plaintiff herein alleges that upon information and belief ten of the jurors, said jury consisting of eleven, voted in favor of finding a verdict for the plaintiff herein in the sum of $20,000. The majority of the jury were in favor of giving to the plaintiff herein a much larger sum. The plaintiff herein is advised and so alleges that only one juror stood out against finding anything for the plaintiff in said suit at law. The plaintiff herein has gone to great expense in the trial of said suit and in the trial in the suit raised by the cross complaint of the

defendants. The plaintiff herein stands ready and willing
6 at all times to try said cause in the suit at law, and alleges that as between the defendants herein and the plaintiff the same issues are joined in the suit at law in this court as those that are involved in the Chancery suit now pending in the Chancery Court in Miller County, State of Arkansas. The defendants herein through their counsel, Frank Quinn and W. H. Arnold, have notified the counsel of the plaintiff herein that they intend to and will prosecute the said suit in the Chancery Court of Miller County, State of Arkansas. The plaintiffs herein allege and charge that the said suit pending in the Miller County Chancery Court was brought by the defendants herein for the sole purpose of depriving this court of its jurisdiction to hear and determine the case of the Burke Construction Company against Board of Improvement of Paving Improvement District No. 20 and numbered 439 on the law docket in this court. The said suit of the defendants herein brought in the Chancery Court of Miller County was brought on March 19, 1920 and was brought as the plaintiff herein alleges and believes solely for the purpose of preventing this court from determining the issues as between the plaintiff in this cause and the defendants in this suit at law. The plaintiffs herein appeared in said suit in the Chancery Court and filed a petition and bond for removal and said plaintiffs still believe that they were entitled to a removal of said cause to this court and did everything in their power to sustain the jurisdiction of this court. The plaintiff herein believes that said suit was brought in the Chancery Court for the sole purpose of harassing and annoying the plaintiff in its action and for the purpose of attempting to deprive this court of its rightful jurisdiction to determine the issues between the plaintiff herein and the defendants in the suit at law. This plaintiff alleges that said suit in Chancery was as this plaintiff verily believes instituted for the sole purpose of depriving this court of its jurisdiction to try said suit at law. The plaintiff herein alleges that the plaintiffs in said Chancery suit in the state court joined as a party defendant therein, J. A. Burke, and M. C. Burke individually and the United States Fidelity Deposit Company of Maryland, these parties being surities on the bond of the Burke Construction Company, for the sole purpose of depriving this court of jurisdiction. The defendants herein had no cause of action against the sureties but said sureties were joined for the sole purpose and for the wrongful and fraudulent purpose of depriving this court of jurisdiction to hear and determine the issues joined in the suit brought by this plaintiff on the law side of this docket. This plaintiff alleges
7 that the defendants herein for the purpose of harassing, injuring and annoying the plaintiff herein persuaded and caused the Secretary of State of the State of Arkansas to threaten proceedings to forfeit the license of this plaintiff to do business in the state of Arkansas. This plaintiff is a construction Company and has a large amount of business in the state of Arkansas and is engaged in Interstate Commerce in the shipment of material and men from one state to another in construction work in Arkansas and in other states. Notwithstanding that and for the wrongful purpose

as above alleged the defendants in this action through themselves and their counsel persuaded the Secretary of State to attempt — forfeit the license of the plaintiff to do business in the State of Arkansas, knowing at the time that this plaintiff did have a legal right to do business in the state of Arkansas. The Secretary of State notified this plaintiff of the application which had been made to have the license forfeited and thereupon this plaintiff brought suit, for the purpose of enjoining the said Tom J. Terral Secretary of State from forfeiting the license of the plaintiff herein to do business in Arkansas in the United States District Court, Eastern District of Arkansas and Little Rock Division, said suit being against [against] Tom J. Terral, Secretary of State. The defendants herein caused their counsel, Frank S. Quinn to appear in said United States District Court at Little Rock before Judge Trieber and resist the granting of an injunction, enjoining the Secretary of State from forfeiting plaintiff's right to do business in Arkansas. The defendants herein, through their counsel, did resist the granting of said injunction but said injunction was granted and was made permanent upon a final trial in the court and the defendants herein wrongfully brought said suit and have never yet paid to the plaintiff herein the costs and expenses laid out by the plaintiff herein by reason of the wrongful act and conduct of the defendants herein in their effort to have the license of the plaintiff to do business in Arkansas forfeited, and said effort of defendants to have plaintiff's license to do business in Arkansas forfeited was made by defendants herein solely because this plaintiff had filed its suit in this court and had removed a cause to this court and was done to harass and injure this plaintiff so as to prevent it appealing to this court for relief against said defendants.

The plaintiff herein alleges and believes that said action on the part of the defendants to have the license of the plaintiff to do business in Arkansas forfeited is based upon the same motive

8 that the suit in Chancery is based upon, and alleges that the action of the defendants herein in bringing said suit in the state court is solely for the purpose of preventing a trial in this court on the law side thereof of the issues joined in said suit. The plaintiff herein alleges that the defendants appeared in this court in said cause 439 Law, and filed a counter claim and asked judgment against the plaintiff herein in sums approximating $100,000 and the defendants herein filed their answer and cross complaint in that cause at law in this court after they had filed their suit in Chancery in the State court seeking substantially the same relief in the counter claim as in said Chancery Court and by thus appearing and filing a cross complaint on a counter claim against this plaintiff in said suit at law the defendants herein waived their right if they ever had any to proceed with the suit in Chancery in the state Court and voluntarily appeared in this court, and asked for full and complete relief under their contract in said suit at law, and prayed for judgment against this plaintiff in said suit at law, and on the trial of said cause this court submitted to the jury the issues raised by these defendants in their counter claim and these

defendants have not withdrawn their counter claim, and the same is now pending in said suit 439 in this court.

This plaintiff alleges that the defendants at this time have no cause of action against the sureties on the bond of this plaintiff and are not entitled to prosecute any action against the sureties on the bond at this time and they have therefore fraudulently made said sureties parties for the sole purpose of preventing a removal of that cause to this court.

By reason of the facts aforesaid the defendants have waived their right to prosecute their alleged suit in the Chancery Court in Miller County and have therefore submitted themselves to the jurisdiction of this court, but notwithstanding such fact the defendants are now insisting on resorting to unnecessary expenditure of costs and an unnecessary consumption of time in proceeding with the trial of said cause in the Chancery Court to the irreparable damage and injury of the plaintiff herein, and for the sole purpose of preventing this court from the determination of the issues and the administration of the rights and remedies involved in suit 439 law, and of which this court first took jurisdiction.

This plaintiff alleges that every issue growing out of said contract between the plaintiff and the defendants herein is involved in said suit 439 Law, and the trial of that cause, will settle every issue as between this plaintiff and these defendants. This court has
9 taken jurisdiction of said cause of action and its proceeding to enforce the rights between the plaintiff and defendants, and it is inequitable and unjust to permit the defendants herein to proceed with the trial of the same issues which are involved in the suit at law in this court in the Chancery Court of Miller County. The trial and determination of the issues in said Chancery Court pending will leave nothing for this court to determine in said suit 439 and defendants are urging and pressing for a trial in said Chancery Court so as to defeat and nullify this court's rightful prior jurisdiction of the issues involved.

This plaintiff alleges that the placing of the sureties on the bond in the Chancery suit does not raise any new issues. The defendants have waived their right to any different issue by appearing in said suit 439 and answering therein and seeking affirmative relief against this plaintiff and have resorted to one trial in this court. The plaintiff therefore alleges that it is entitled to the ancillary relief in this court of equity and is entitled to have the plaintiffs in the Chancery Court of the state, being the defendants in this cause, and their agents, counsel representatives and attorneys enjoined from prosecuting said suit in the Chancery Court until the further order of this court. The plaintiff alleges that the prosecution of said suit in the Chancery Court will do irreparable damage and injury to this plaintiff because it will entail a heavy expense by reason of the trial, which expense cannot be taxed as costs, and even if the plaintiff herein wins the suit in the Chancery State Court it will be mulct in heavy costs and heavy loss of time and loss of employees and counsel fees and other expenses which can never be recovered. The plaintiff therefore alleges that it is entitled to equitable relief as it

has no complete remedy at law. The court of law has no jurisdiction to grant an injunction but this court has jurisdiction to enjoin the defendants from proceeding in the State Court for the purpose of injuring and damaging the plaintiff in this cause as herein shown and for the purpose of preventing this court from proceeding to a final determination of the issues between the plaintiff and the defendant in the suit at law in this court. The sole purpose of the suit brought by the defendants in this action in the Chancery Court of Miller County, Arkansas, is to interfere with the jurisdiction of this court in case number 439 Law, being the suit at law of this plaintiff against the defendants, and the defendants herein by said suit in the Chancery Court, unless restrained by the order of this court, will wrongfully harass and injure this plaintiff and will prevent this court from effectually and rightfully determining the issues in said suit at law in this court between the parties thereto, and said defendants if not restrained will wrongfully impede this court in the due administration of justice between the parties hereto, and will wrongfully prevent this court from the due administration of the rights and remedies as between the parties hereto of which this court has acquired prior exclusive jurisdiction in the litigation between the parties hereto in said suit at law before this court.

Premises considered the plaintiff herein prays that the court grant a preliminary restraining order enjoining and restraining the defendants herein and each of them and their agents, attorneys and representatives from prosecuting any further proceeding in said suit in the Chancery Court in the state of Arkansas in Miller County, and from further taking evidence in said cause and from any further proceeding in said cause until further order of this court, and for all other and further relief to which the plaintiff in equity and good conscience may be entitled.

JAMES D. HEAD,
JAMES B. McDONOUGH,
Counsel for Plaintiffs.

Affidavit.

I, James A. Burke, on oath state that I am one of the stockholders and directors of the Burke Construction Company. I further state that M. C. Burke is absent from this county at this time. I have read over the above and foregoing complaint and the matters therein stated are true to the best of my knowledge and belief.

J. A. BURKE.

Subscribed and sworn to before me this 23 day of August, 1920.
[SEAL.]
JOHN H. VAUGHN,
Notary Public.

My commission expires Mar. 25, 1922.

(Note by Clerk of Trial Court: Three exhibits are appended to the foregoing Bill of Complaint, to-wit:

Complaint at Law filed February 16, 1920;
Answer and Counterclaim filed July 2, 1920; and
Demurrer and Reply to Counterclaim filed July 20, 1920, all in U. S. District Court in case No. 439 Law.
These three pleadings appear in the evidence constituting a part of this transcript, and the same are therefore not copied here.)

Answer.

Filed in U. S. District Court August 30, 1920.

Now come the defendants, John P. Kline, Milton Winham and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and for answer to the bill of complaint herein respectfully states:

The defendants are not possessed of sufficient knowledge or information as to whether the plaintiff is a corporation now existing under the laws of the State of Missouri, and therefore denies that plaintiff is a corporation or is a citizen of the State of Missouri. It is not true that the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, is a corporation organized for the purpose of paving streets in said city, and it is not true that the defendant Board is a body corporate and politic. It is not true that the defendants John P. Kline, Milton Winham and Paul G. Huckins compose the Board of Improvement of said Improvement District, and said district was duly organized under the improvement district laws of the State of Arkansas governing improvement districts in cities and towns in said state, and the said district was organized for the purpose of paving, curbing and guttering certain streets in said city.

Defendants deny that this suit is a controversy involving an amount in excess of three thousand ($3,000.00) dollars, and denies that the issues in the case of Burke Construction Company vs. Board of Improvement, No. 439 law, pending in this court are the same as the issues in the case of the Board of Improvement vs. Burke Construction Company, M. C. Burke, J. A. Burke and the United
12 States Fidelity & Guaranty Company, No. 692, now pending in the Chancery Court of Miller County, Arkansas.

The defendant states the truth to be that on the 29th day of November, 1916, the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, as party of the first part, and the Burke Construction Company as party of the second part, entered into a contract whereby the said Burke Construction Company undertook to do certain grading, paving and curbing upon the streets in said district in Texarkana, Arkansas, and the Board of Improvement agreed to pay therefor certain specified amounts for said work complete, and under the contract the said Construction Company agreed to complete all of said work within one year after the date of said contract. Said Construction Company did a small part of said work during said year, wholly failing to complete said work within the time specified, and the

Board of Improvement, at the request of said Construction Company, extended the time of completion of said work until November 1, 1918, and said Construction Company did some work after said extension but had not completed the contract at the expiration of said time, and thereupon the said parties entered into another extension of time for the completion of said work, until November 1, 1919, and said Construction Company did some more work under said contract, but did not complete said contract during said second extended time, and had not completed more than one-half of said work, and in violation of its said contract the said Burke Construction Company quit said work in the month of December, 1919, whereby the defendant was damaged in the difference between the contract price of said work and what it would take to complete the work according to the plans and specifications, in the sum of at least Eighty Thousand ($80,000.) Dollars. Under the contract the defendant had the right to retain, and had retained certain percentages of the amount due for work done, amounting to approximately Fifteen Thousand ($15,000.) Dollars, and said Construction Company also did some work in the month of November amounting to approximately Forty-five Hundred ($4500.) Dollars, which was held back as additional security for the performance of the contract.

The defendant further states that when said contract was made the said Burke Construction Company, as a part of said contract, furnished a surety bond to the said defendant in the sum of Three Hundred Thousand ($300,000.) Dollars conditioned that if the said Burke Construction Company should well and truly
13 perform the said contract, and in all respects comply with the terms and conditions of said agreement, which was made part of said bond, then in that event the said bond should be null and void, otherwise to remain in full force and virtue. Said bond was executed by the said Burke Construction Company as principal and the United States Fidelity & Guaranty Company of Baltimore, Maryland, and M. C. Burke and James A. Burke of Fort Smith, Arkansas, and said bond was accepted and approved by said defendant and upon the faith and credit thereof the said contract was let to the said Burke Construction Company.

It is true that the Burke Construction Company filed a suit in the District Court of the United States for the Western District of Arkansas on the 16th day of February, 1920, after it had wrongfully abandoned said work, claiming damages in the sum of Eighty-five Thousand ($85,000.) Dollars for an alleged breach of the contract on the part of the defendant Board, and subsequently filed two substituted and amended complaints in which the damages finally claimed was One Hundred and Fifteen Thousand ($115,000.) Dollars. The Burke Construction Company was and is the sole plaintiff and this defendant Board was and is the sole defendant in said suit, and said suit purports to be one only for damages for alleged breach of contract. The defendant refers to the said original and substituted complaints for more definite understanding of the contents thereof.

It is true that various pleadings have been filed in opposition to

said suit, which is disclosed by the record in said cause, and among other things the defendant filed an answer showing fully the reasons why the plaintiff's claim is false and unfounded, and also set up a counter-claim against the said Burke Construction Company for damages on account of its breach of the contract in failing and refusing to carry out said contract amounting to Eighty-eight Thousand ($88,000.) Dollars, which is the difference between the contract price of said work and the expense of completing the same at the time the contract was broken by the said Burke Construction Company, and for certain defective work which the Burke Construction Company had done and for a specified amount under the contract which the defendant had the right to deduct upon waiving a certain maintenance of the work done by the Burke Construction Company for a period of five years, amounting to about Thirty-four Hundred ($3400.00) Dollars.

It is further shown in the said answer and counter-claim that the Burke Construction Company was insolvent, and that it
14 would have been unjust and inequitable in view of said insolvency for the defendant district to pay over to the said Burke Construction Company the retained percentages for the work which had been done in the month of November, 1919, in view of the fact that said company had abandoned the work and this defendant had been damaged thereby in the said sum of $88,000.00. It is true that the case was tried before a jury, but the defendant is not advised as to how the jury stood in their deliberations, and the defendant believes that it is immaterial so far as this case is concerned as to how the jury did stand as there was no verdict reached by the jury, and the case stands upon the docket now untried and undisposed of just as it did before the case was submitted to the jury. The sureties upon the bond of the Burke Construction Company have not been made parties to the said suit, and will not be bound by any judgment which may be rendered in said cause, and in view of the obligations of the said sureties to see that said contract was carried out, the defendant is advised that they had the right to bring suit upon said bond for the collection of the damages which would be found by the Chancery Court of Miller County, Arkansas, in a settlement of all the issues and matters involved between the Burke Construction Company and this defendant, in which case the plaintiff asks for an accounting and an ascertainment of the amount which would be due the defendant upon an accounting, and said court has jurisdiction of said cause and the parties have been duly served and they have filed their answers therein, said answers having been filed by the Burke Construction Company, The United States Fidelity & Guaranty Company, M. C. Burke and J. A. Burke; the said cause was filed in the Chancery Court on the 19th day of March, 1920, after the suit had been filed in the Federal Court by the Burke Construction Company but before this defendant had answered to the complaint in the Federal Court. The said suit in the Chancery Court was removed to the Federal Court by the defendant Burke Construction Company, in which motion the other defendants did not join, said Burke Construction Company claiming it to

be a separable controversy. The motion to transfer was sustained by the Chancery Court over the objection and against the protest of the said plaintiff, the Board of Improvement of Paving Improvement District No. 20, and after the transcript was filed in the Federal Court the said Board filed a motion to have said cause remanded to the Chancery Court, which motion was granted by the Federal Court, and the said cause is now duly pending in the Chancery Court of Miller County, Arkansas, against said Burke Con-
15 struction Company and the sureties upon said bond for the purpose of recovering upon said bond the amount of damages due on account of breach of said contract, and the issues in said cause involve an accounting between said Burke Construction Company and the said defendant Board and the liability of the sureties upon said bond, and said issues are more extensive and cover more subjects than the issues involved in the Federal Court in cause 439; and moreover, the parties defendant in said cause include all the sureties upon said bond who are in no wise interested or concerned in the case No. 439 pending in the Federal Court; and it is not true that the defendant brought said suit in the Chancery Court for the purpose of evading or avoiding the jurisdiction of the Federal Court to try said cause No. 439, but on the contrary the said Board of Improvement joined with the efforts of the plaintiff in getting their witnesses to attend the court from all over the country at the trial which was begun on the 20th day of July, 1920, and which lasted for a period of ten days, and in the meantime the case in the Chancery Court was allowed to remain without any effort on the part of the defendant to force a trial before the 20th of July, the day fixed for the trial of said Federal case, but defendant did not waive its right to insist upon a trial of said case at such time as the parties could conveniently get prepared for trial, and until such time as the Chancellor could find it convenient to hear the same, and after the mistrial in the said case in the Federal Court, the defendant, on account of the public necessity and on account of the vast public interests involved felt that they were in duty bound required to proceed with the Chancery case, especially since the ultimate relief in the case depended upon a recovery under the said bond which the said sureties would not pay without a suit, and which parties could not be brought into the said cause No. 439, and it is not true that a recovery in the Federal Court in cause No. 439 in favor of the District would settle the case as against the Bond Company, for said Bonding Company and the other sureties would not be bound by such decision.

The defendant here refers to the transcript of the said complaint and proceedings in the Chancery Court of Miller County, Arkansas, which is on file with the Clerk of this court, having been transmitted to the court when the Chancery Court made the order for the removal of the case to the Federal Court, and it will appear from said complaint that the issues made or tendered and the parties are different from those in said cause 439.

16 The defendant shows that this, the Federal Court, is a different jurisdiction from the Chancery Court of Miller County,

Arkansas, and that each court has its own rights and limitations under the law, and that there is nothing in the complaint herein showing a ground for equitable relief to prevent the Board of Improvement from proceeding to take testimony in said Chancery Court of Miller County, Arkansas, with a view to a trial of said cause.

It is true that the defendants intend to proceed with the trial of said cause pending in said Miller County Chancery Court, as they have the right to do as they verily believe. It is not true that the said Chancery suit was brought for the sole purpose of depriving this Court of its jurisdiction in said suit at law No. 439. It is not true that said chancery case was brought with any purpose whatever of hindering and delaying this court in the hearing and determining of the said law case No. 439. And it is not true that said Chancery case was brought solely or otherwise for the purpose of preventing this court from determining the issues between the plaintiff and the defendants in the said mentioned suit at law. Defendants deny that said Chancery case was brought for the purpose of [harrassing] or annoying the plaintiff, or for the purpose of in any manner hindering or delaying this Court, or depriving it of its jurisdiction. It is not true that J. A. Burke, M. C. Burke and the United States Fidelity & Guaranty Company were joined as defendants in said Chancery suit, for the sole purpose, or otherwise, of depriving this Court of jurisdiction; defendants state the truth to be that they have a cause of action against said bondsmen, and are attempting to enforce the just rights of said Board of Improvement against said bondsmen, as it is the duty of said defendants to do; and it is not true that said bondsmen were joined in said Chancery suit for the sole purpose, or for any wrongful or fraudulent purpose whatever, of depriving this Court of its jurisdiction to hear and determine the issues joined in said law suit No. 439.

After the return of said cause to said Chancery court, the defendant, the plaintiff herein, filed various motions and demurrers, the bondsmen who were parties to said suit adopting the said motions and demurrers as their own. On June 17, 1920, the demurrers of the said defendants were overruled by the said Chancery Court of Miller County, and it was at the said time agreed between the Court and the parties plaintiff and defendant, that the said Burke Construction Company and said bondsmen would file their answer to said complaint within two weeks from said date. That on
17 or about the 1st of July, 1920, the said Burke Construction Company and M. C. Burke and J. A. Burke, filed their joint answer to the plaintiff's complaint. It was further agreed at the time of overruling said demurrers, by and between the Court and the parties plaintiff and defendant, that a date would be fixed and agreed upon by all of the respective parties, sometime during the summer of 1920, for the trial of said Chancery case, said agreement having been made in open Court by Mr. J. D. Head, defendants' attorney, and W. H. Arnold and Frank S. Quinn, the plaintiff's attorneys in said cause, and it was further understood that the Chancellor of said Miller Chancery Court would come back to Texarkana at sometime

during the time of his summer vacation and hear the testimony in the said cause. Defendants state the truth to be that the bringing of the present proceedings by the plaintiff, is contrary to the previous proceedings and conduct of the plaintiff, and contrary to its agreements, and results from the failure of the plaintiff to maintain its said suit at law No. 439 in this Court, and it is unwarranted and without foundation. These defendants state that notwithstanding the plaintiff's agreements as to the taking of testimony and the hearing of the case as speedily as possible, the said plaintiff now positively refuses to agree to the taking of testimony, and its attorney, Mr. McDonough, has so notified these defendants, and it has now become necessary in order to take the said testimony, to give the said plaintiff notice that defendants will proceed with the said testimony, the date for the taking of said testimony being fixed for Tuesday, August 31, 1920. And these defendants have arranged for *its* witnesseses to be present at said time, and have requested the Chancellor also to be present, which he has consented to do, and have made other arrangements and preparations for the taking of said testimony; and it will be a hardship and an injury to the defendants if the taking of said testimony has to now be postponed. Defendants further show to the Court that the said Chancery suit involves the public interest; that an important public improvement, namely, the paving of certain streets in the city of Texarkana, Arkansas, is stopped because of the litigation now pending between the plaintiff and these defendants, and between these defendants and the plaintiff's said bondsmen; that it is to the public interest for said litigation to be settled as [sppedily] as possible; and that the interest of the Burke Construction Company in its suit at law ought not to be made paramount to the interest of the property owners in said District No. 20, to the extent of delaying the determination and decision of the defendants' rights by waiting for the most propitious time in the opinion of said plaintiff for the trial of its said suit at law.

18

It is not true that the defendants herein, for the purpose of harassing, or injuring or annoying the plaintiff herein, persuaded or caused the Secretary of State of Arkansas to threaten proceedings to forfeit the license of the plaintiff to do business in said State, and it is not true that the plaintiff is engaged in interstate commerce in the shipment of men and materials from one state to another, nor is the plaintiff otherwise engaged in interstate commerce. The truth is that the plaintiff is a construction company, organized only for that purpose, with no authority, incidental or actual, to engage in interstate commerce, and said company is in no sense a carrier or shipper of goods in commerce for barter or trade. And it is not true that the defendants and their counsel persuaded the Secretary of State to attempt to forfeit the license of the plaintiff to do business in the State of Arkansas wrongfully or for a wrongful purpose. Defendants state the truth to be that when the Secretary of State was proceeding to act upon the matter of cancelling the license of said plaintiff, the said plaintiff then had no legal right to do business in said state, because under the laws of the State of Arkansas, the plain-

tiff had breached its agreement not to bring suit against a resident of the State of Arkansas, and had violated the laws of Arkansas by bringing said suit at law No. 439 against these defendants who were then residents of said state. The Supreme Court of Arkansas had, previous to the proceedings by the Secretary of State of Arkansas, to cancel the said license of the plaintiff, decided that corporations not engaged in interstate commerce were subject to said law providing for the cancellation of the license of a corporation to do business in this state; and these defendants had the right then, and still have as they believe, to insist upon compliance with said law by said plaintiff, and said Secretary of State then had, and still has, as defendants believe, the right to proceed to cancel the license of said plaintiff. Defendants further state that the order and decree of the United States District Court for the Eastern District of Arkansas, has been duly appealed to the Supreme Court of the United States, and is now there pending, and is returnable to the October Term of said Court, when a final decision of the said right of cancellation will be determined, and that the Attorney General of the State of Arkansas, has
19 entered his appearance in said cause in the Supreme Court of the United States as Counsel for the appellant, and also said Attorney General was present at the hearing of said cause in the trial Court. It is not true that these defendants owe anything to the plaintiff for costs and expenses in connection with said suit to revoke the license of the plaintiff. The Court ordered that the costs of suit be adjudged against the Secretary of State, but that execution thereon be stayed until such time as the legislature of the state of Arkansas should meet and make allowance for said costs, and said Court in no wise made any order holding these defendants responsible to the plaintiff for any amount whatever. And it is not true that there was any wrongful act whatever done by these defendants in connection with said proceeding, but only such things were done as the defendants had the lawful right to do.

It is not true that the same motive existed regarding the proceeding to revoke the license of the plaintiff as existed, and exists, for the Chancery Court proceeding, and it is not true that any unlawful motive or wrongful motive existed or now exists in either case. The defendants had, and still have the lawful right to insist upon both proceedings. Defendants deny that the said Chancery suit was brought for the purpose of preventing a trial of the said law suit No. 439. It is not true that by appearing and filing an answer and counterclaim in said suit No. 439 the defendants have waived their rights to proceed with the said suit in the Chancery Court. It is not true that defendants voluntarily appeared in this Court in said suit No. 439, but they were required to answer by the service of process upon them in the said suit; that upon service of process in said suit, it became and was the duty of these defendants to interpose such defenses as they had, which these defendants did, and which was nothing more than is required of all defendants in such cases. It is not true that defendants can have complete relief in said cause No. 439, but if defendants should be successful therein, it will still be necessary to proceed in said cause in the Chancery Court of Miller

County to settle and adjust the rights of the defendants against the bondsmen upon said contract.

It is not true that these defendants have no cause of action in the Chancery Court case against the sureties upon the plaintiff's bond. On the contrary, these defendants have a cause of action in said suit against said bondsmen as stated in the complaint in said Chancery cause and so decided in the said Chancery Court. The said bondsmen have tested said complaint by demurrer, and said demurrer has been overruled and the complaint adjudged to state a cause of action against said bondsmen, and plaintiffs in said chancery cause have been adjudged entitled to prosecute said cause against said bondsmen. And it is not true that the bondsmen were joined in said Chancery suit for the wrongful or fraudulent purpose of preventing a removal of said suit to the United States District Court, or for any other wrongful or fraudulent purpose whatever.

Defendants deny that by reason of any facts set forth in plaintiff's complaint herein, these defendants have waived their rights to prosecute said Chancery cause. They deny that they are insisting upon unnecessary expense and costs or any unnecessary consumption of time in proceeding with said Chancery suit; deny that by reason of such proceedings the plaintiff will suffer irreparable damage and injury, but state the truth to be that said Chancery suit is proceeding as other such suits proceed, and in the regular way and according to the usual Chancery practice in the Chancery Courts of the State of Arkansas. It is not true that said cause is proceeding for the sole purpose of preventing the determination of the issues in the law case No. 439 and the administration of the rights and remedies involved in said suit.

It is not true that every issue between the plaintiff and these defendants growing out of the contract between the plaintiff and defendants is involved in said suit No. 439 law, but the truth is that these defendants have other equitable rights and remedies, such as an accounting between the parties, and the avoidance of a multiplicity of suits, and the adjustment of equities in retained percentages held under the said contract. It is not true that the trial of the said law case No. 439 will settle every issue between the plaintiffs and these defendants. It is not true that this Court has taken jurisdiction to enforce the rights between the plaintiff and the defendants, but this Court has expressly declined to allow an accounting between the parties, such as is sought in the said Chancery suit, and these defendants have no way to obtain such an accounting, to which they are rightfully entitled, except through the said Chancery cause. It is not true that it is inequitable and unjust to permit these defendants to proceed with the trial of said Chancery suit.

It is not true that placing the sureties on the plaintiff's bond in the Chancery suit does not raise any new issue, but the truth is that new issues and new parties, different from the issues and parties in the case No. 439 Law, are before the Court in said Chancery suit. The defendants have not waived their rights to any issues involved in

either the law case or the said Chancery case, but are still insisting upon all rights belonging to them. The plaintiff herein is
21 not entitled to any relief, ancillary or otherwise, against these defendants, or their agents, counsel, representatives or attorneys, by reason of the pendency of said Chancery suit, or any proceedings therein, and the plaintiff is not entitled to have these defendants, or their agents, counsel, representatives, or attorneys, barred from prosecuting said Chancery suit. Defendants deny that the prosecution of said Chancery suit will do irreparable damage and injury to plaintiff because it will entail a heavy expense by reason of the trial which cannot be taxed as costs; denies that the plaintiff will be mulcted in heavy costs and heavy loss of time and loss of employees and counsel fees and other expenses which can never be recovered; deny that plaintiff is entitled to any equitable relief herein; deny that plaintiff has no complete remedy at law; deny that the sole purpose of the said Chancery suit is to interfere with the jurisdiction of this court in said case No. 439 law. It is not true that these defendants, unless restrained by this court, will harass, wrongfully or otherwise, or will injure this plaintiff, or will prevent this court from effectually and rightfully determining the issues in said suit at law No. 439; and it is not true that these defendants, unless restrained, will wrongfully impede this Court in the due administration of the rights and remedies between the parties; and it is not true that this Court has acquired exclusive jurisdiction of all the litigation between the parties in said suit at law No. 439.

Wherefore, the defendants pray that the plaintiff take nothing by its complaint herein, that its motion for a temporary restraining order be denied, and that these defendants go hence without day, and for all other proper relief in the premises.

W. H. ARNOLD,
FRANK S. QUINN,
Solicitors for Defendants.

STATE OF ARKANSAS,
County of Miller:

John P. Kline, on oath, states that he is a member of the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and is Chairman of said Board; That he has read the statements contained in the above and foregoing Response, and that the same are true.

JOHN P. KLINE.

22 Subscribed and sworn to before me this the 28 day of August, 1920.

[SEAL.]

G. G. POPE,
Notary Public, Miller County, Ark.

My commission expires May 4, 1923.

(*Decree of the District Court, August* 30, 1920.)

No. 47. Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

JOHN P. KLINE, MILTON WINHAM, and PAUL G. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, Defendants.

Decree.

Now on this 30th day of August, A. D. 1920, comes the plaintiff herein, the Burke Construction Company by its counsel, James B. McDonough, and makes application to the court for a preliminary injunction. Notice of said application having been given for said preliminary injunction against defendants, John P. Kline, Milton Winham, and Paul G. Huckins, as the Board of Improvement of Paving Improvement District #20 of the city of Texarkana, Arkansas, to enjoin and restrain said defendants from proceeding with a certain suit, pending in the Chancery Court of Miller County, Arkansas, wherein the said John P. Kline, Milton Winham, and Paul G. Huckins as the Board of Improvement of Paving Improvement District #20 of the city of Texarkana, Arkansas are plaintiffs, and the Burke Construction Company and M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company of Baltimore, Maryland, are defendants, being case number 692 in said Chancery Court.

And also come the defendants hereto by their attorneys, Frank S. Quinn and W. H. Arnold in resistance to said application for a preliminary injunction and file herein the defendants' answer to said plaintiff's complaint herein.

Thereupon the said application for a preliminary injunction as an interlocutory order is submitted to the court, upon the plaintiff's complaint in equity and the exhibits thereto, the answer of the defendants and the original and second and last amended and substituted complaint in the case of the Burke Construction Company, plaintiff, against the Board of Improvement of Paving Improvement District #20 of Texarkana, Arkansas, and John P. Kline,
23 Paul G. Huckins and Milton Winham, members of said Board in the District Court of the United States for the Western District of Arkansas, Texarkana Division, numbered 439 at law, and the answer of the defendant in said cause 439, including the counter claim and reply thereto and all record entries in said cause, and also upon the transcript of all papers and record entries in said cause numbered 692, Board of Improvement of Paving Improvement District #20 against Burke Construction Company, transferred from the Chancery Court of Miller County, Arkansas, to the United States District Court for the Western District of Arkansas, Texarkana Division, being cause numbered 43 Equity in said United States District

Court, and the order of remand of the said cause to the Chancery Court of Miller County, Arkansas, and the demurrer and answer of the Burke Construction Company, M. C. Burke, James A. Burke and the United States Fidelity & Guaranty Company defendants in said Chancery Court filed after said remand to said State Chancery Court, and upon the answer of the defendant, the Burke Construction Company, M. C. Burke, James A. Burke and the separate answer of the defendant, the United States Fidelity & Guaranty Company in said cause numbered 692 in the said Miller Chancery Court filed after the remand of said cause to said state court, and upon the order of the said Chancery Court of Miller County, overruling the demurrer of the defendants to said plaintiff's complaint in said cause 692.

And the court upon consideration of said application for a preliminary injunction and interlocutory order and the said evidence introduced as above set forth and after hearing argument of counsel and being well and sufficiently advised in the premises finds that the application of the plaintiffs for a preliminary injunction against the defendants is not well taken and should be overruled and denied.

It is therefore by the court considered, ordered, adjudged and decreed that the application of the plaintiff herein for a preliminary injunction against the said defendants be and the same is overruled, and denied. To which action of the court in overruling and denying said application for a preliminary injunction the plantiff at the time duly excepted.

FRANK A. YOUMANS,
Judge.

24 STATEMENT OF THE EVIDENCE.

Filed in U. S. District Court September 7, 1920.

Certificate of the Trial Judge of the Correctness and Accuracy of the Evidence under Rule 75, Equity.

The undersigned, being United States District Judge of the Western District of Arkansas, and the Texarkana Division, and being the Judge who heard the application of the Burke Construction Company for a preliminary injunction in this cause, hereby certifies that the pleadings, orders, papers and documents hereto attached called for in the interlocutory order of the court, denying a preliminary injunction herein, constitute a true, complete and properly prepared statement of the evidence in this cause. The said statement is hereby approved, and directed to be filed in the clerk's office, as required by the Rules.

FRANK A. YOUMANS,
District Judge.

(Complaint at Law in the Case of Burke Construction Company vs. Paving Improvement District No. 20, etc., et al., No. 439, in the District Court, Western District of Arkansas.)

(Filed in the U. S. District Court February 16, 1920.)

In the United States District Court, Western District of Arkansas, Texarkana Division.

439. Law.

THE BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

PAVING IMPROVEMENT DISTRICT NO. 20 OF TEXARKANA, ARKANSAS, John P. Kline, Paul Huckins and Milton Winham, Defendants.

Comes the plaintiff, The Burke Construction Company, and for cause of action against the defendants, Paving Improvement District Number twenty, of the City of Texarkana, Arkansas, and John P. Kline, Paul Huckins and Milton Winham, individually, and as members of the Board of Improvement of said Paving Improvement District Number twenty, states as follows:

The Burke Construction Company is a corporation organized under the laws of the State of Missouri, and under the law is a citizen and resident of said State, and was such at the time of making of the contract hereinafter referred to, and is still a citizen and resident.

The defendant, Paving Improvement District Number Twenty, of the City of Texarkana, Arkansas, is an improvement district organized under the laws of the State of Arkansas, and is a body politic and corporate, and has the power of suing and being sued, and is under the law a citizen and resident of the County of Miller and State of Arkansas. The defendant John P. Kline is Chairman of the Board of Improvement of said Improvement District above described, and is a citizen and resident of the County of Miller, State of Arkansas, Paul Huckins, the defendant, is also a member of said Board of Improvement, and is Secretary of the same, and is also a citizen and resident of said Miller County, State of Arkansas. Milton Winham, the defendant, is a member of said Board of Improvement, and is also a citizen and resident of Miller County, State of Arkansas. The plaintiff and the defendants are therefore citizens and residents of different States. The defendants are all located in the Western District of Arkansas, Texarkana Division. This suit is of a civil nature, and the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

Further complaining of the defendants, the plaintiff states that the Paving Improvement District No. 20, which will be hereafter referred to as the Improvement District, was organized for the purpose

of constructing certain paving improvements within the City of Texarkana, State of Arkansas, Miller County. The defendants, the Board of Improvement above named, advertised for bids, and the contract for the construction of said improvement was awarded to the plaintiff herein. This contract was entered into by and between the plaintiff and the defendant improvement district through its proper officers, and on the 29th day of November, 1916. The plaintiff alleges that one of the originals of said contract is now in the possession of the defendants, and they are familiar with the terms and conditions of said contract. The said plaintiff hereto attaches a printed copy of said contract, attaching the same as "Exhibit A" to this complaint, and the same is made a part hereof as aforesaid, as though set out in full herein.

The plaintiff entered upon the construction of said work, and but for the unlawful breaches of the contract on the part of the
26 defendants the plaintiff would have completed said work as required by the terms of said contract.

The plaintiff alleges that the defendants selected one E. F. Peterson as engineer of said improvement district, and the defendants John P. Kline, Paul Huckins and Milton Winham, constituting the Board of Improvements, endorsed, approved and confirmed the wrongful and illegal actions of said engineer, which actions broke the contract between plaintiff and defendant and damaged the plaintiff as hereinafter set out.

Immediately after the contract was awarded to the plaintiff, and after the signature and execution of said contract and the giving of the bond by the plaintiff as required under the terms of said contract, the plaintiff began making preparation on an extended scale to fulfill and complete said contract within the time required under the terms thereof. The plaintiff immediately began the shipment of machinery, tools and men for the purpose of carrying out said contract as agreed. Within approximately a period of thirty days the plaintiff had assembled material, tools and men on and near the ground, which would equal in value approximately $10,000.00, and the plaintiff then and there entered upon said preparation and work, and was ready at all times to push the same to completion. The defendants, the improvements District and the officers thereof, both as such officers and as individuals, and the engineer, had full and complete knowledge that the plaintiff had its tools, machinery and materials on hand for the purpose of beginning work. Instead of complying with the contract and arranging for permitting the plaintiff, the Burke Construction Company, to begin said work, the defendants, the Improvement District and the engineer arbitrarily and wrongfully neglected, and carelessly failed to give the grades as required under the contract, and negligently, carelessly and wantonly failed and refused to give the grades, and failed to designate the place or places where the plaintiff could go to work. This expensive delay was due solely and alone to the [wanton-ess] on the part of engineer and the other defendants to carry out their part of the contract and designate places and give the proper grades. This breach of the con-

tract on the part of the defendants damaged the plaintiff as hereinafter set out.

Further complaining of the defendants and each of them, the plaintiff alleges that even after the plaintiff had been given notice that it might proceed with the work, and did proceed with the work, it immediately found that the defendants had wholly failed,
27 neglected and omitted to notify the water company and the gas company to lower their pipes of said companies to the end that the paving could be done in accordance with the contract. Under the terms of said contract it was the duty of the defendants to give proper notice to all companies that had pipes and other obstructions in and under the streets that said pipes must be lowered, and that all obstructions must be removed. The engineer of the defendants and the other defendants negligently, carelessly and wantonly failed to take said steps, and utterly failed to give such notice. Whereupon, when the plaintiff began its work on said streets, it soon found that the defendants had wholly failed and neglected to perform their contract in that respect, and had wholly failed and neglected to have the water company and the gas companies owning and operating pipes and other obstructions in the streets to remove such obstructions and pipes, and to keep them out of the way of said work of said plaintiff. Plaintiff alleges that said action on the part of the engineer and the other defendants and each of them was wanton and gross, and said defendants had no excuse whatever for failing and neglecting to perform their contract and to keep said streets clear of pipes and all other matters that would and did retard the work of construction. The plaintiff further alleges that by reason of said breach of contract, and by reason of the arbitrary, wrongful and unlawful action of the defendants, that in failing to have said obstructions removed from the streets, that said defendants broke said contract, and damaged plaintiff by reason of the delay and other damages, all of which are hereinafter more fully set out.

Plaintiff further alleges that said wantonness, negligence and wrongfulness and arbitrariness of the engineer of the defendants and all of the defendants in failing to keep the water and gas pipes and other obstructions out of the way of the plaintiff continued from the commencement of the contract until the final breach thereof. The plaintiff alleges that it was ernormously damaged by reason of said wantonness, [car-lessness] and negligence of said defendants, and the consequent breach of the contract, and said damages, continued from the commencement of the work by the plaintiff until the defendants arbitrarily, wrongfully and unlawfully took said work away from the plaintiff as hereinafter more fully set out.

Plaintiff further alleges that the delays in preparing the streets and in designating the places of work and in passing upon the material and doing all other things required by said contract by
28 the engineer of the defendants, and by the other defendants continued from the beginning of said contract until the final breach thereof by the defendants, as hereinafter set out.

Plaintiff further alleges that repeatedly during the plaintiff's efforts to comply with said contract the plaintiff complained to the

board of the arbitrary, wanton and wrongful and unlawful action of the engineer. The plaintiff alleges that it made complaints in writing and also made verbal and oral complaints before the Board and to the members of the Board; that the Board waived in many instances the written complaints; that at different times one or more members of the Board verbally admitted to the plaintiff that said engineer was in the wrong, and promised to the *representations* of the plaintiff that the arbitrary and wrongful action of said engineer would be corrected, and would not be permitted, and again and again promised the plaintiff that the said arbitrary and wrongful action of the engineer herein described would not be permitted, and that the defendants would comply with their contract, but said defendants negligently and carelessly failed to right the arbitrary and wrongful decisions of said engineer, and continued to allow said arbitrary decisions to be made by him in violation of the plaintiff's rights under said contract, and permitted such violations during the entire life of said contract.

Plaintiff alleges further that the arbitrary, [wrongful] — unlawful conduct of said engineer which resulted in the breach of the contract and in damage to the plaintiff, are in part more particularly described as follows:

In the first place, in the very beginning of the contract the said engineer, through carelessness and negligence, erroneously gave a wrong grade for the curbing. One of these was made on Eleventh Street in said City of Texarkana. Following the location made by the engineer, and under his direction, the plaintiff constructed the curb and gutter according to the instructions given by the said engineer; and later thereafter the engineer found that he had made a mistake in the first place, and he thereupon arbitrarily, wrongfully and unlawfully attempted to impose upon the plaintiff the expense caused by his own negligence and wrongful directions. Whereupon, the said engineer, notwithstanding the fact that he had committed an error in his location of the first estimate on the gutter, then ruled wrongfully and arbitrarily that that expense, due to his error, should be borne by the plaintiff. The action of said engineer was in effect approved by the other defendants, and the other defendants
29 thus arbitrarily and unjustly endorsed the action of the engineer, and the action of the defendants all combined thus wrongfully damaged and injured the plaintiff as hereinafter more particularly described and set out.

The plaintiff further alleges that throughout the work from beginning to the close the said engineer would hurriedly and carelessly make serious errors in the location of the curbs and gutters and paving, and although he was alone responsible for said errors in locating the curbs, gutters and paving through carelessness, negligence and incompetency on the part of the defendants' engineer, he charged up the plaintiff with the damages, and the said engineer arbitrarily, wrongfully and wantonly charged the plaintiff with the expenses of his own errors, and he thereafter proceeded to charge against the plaintiff all the expenses on account of the errors committed by him

self, and thus damaged the plaintiff in sums hereinafter more particularly described.

The plaintiff further alleges that the said engineer negligently and carelessly authorized the plaintiff to go ahead with the construction of curb and gutter, and approved all the actions of the plaintiff in endeavoring to construct the curb and gutter, and had his inspectors to watch said work; and that said work was done under the supervision of the defendants, and notwithstanding the said defendants had ordered, approved and directed the construction of said curb and gutters, and notwithstanding the said defendants understood the condition under which the work was done by the plaintiff, the said engineer and the other defendants arbitrarily, wantonly and illegally attempted to charge, and did charge against the plaintiff a large amount of curb and gutter which they claimed was frozen, and which they had condemned on that account, and notwithstanding said curb and gutter was put in under the direction of the engineer and the other defendants; and notwithstanding the fact that under the contract they assumed all liability for putting in the same, they have arbitrarily, illegally and unjustly decided that said curb and gutter was frozen, and required the plaintiff to take out said curb and gutter, at its own damage, thereby damaging said plaintiff as hereinafter set out.

This unlawful action of the engineer of the defendants,—and the other defendants, was repeated time and again, and damaged the plaintiff wrongfully arbitrarily and illegally.

30 Said engineer and the other defendants were guilty of arbitrary, illegal and wrongful action in the matter relating to the use of the gravel which was already in the streets and within the territory of the improvement district. At the time of the execution of the contract, there was located in the streets a large quantity of gravel, amounting to 14,000 cubic yards. Said gravel was valuable construction material, for use in the paving of said streets, and said contract provided that said gravel might be used. The plaintiff made its bid upon the Construction of said improvement with the distinct understanding, and upon the express representation by the defendants, that said gravel already in the streets could be used in the construction of the improvement as the said gravel was good material. Notwithstanding the fact that said gravel was permitted to be used in the contract, the engineer and the other defendants arbitrarily and wrongfully made such requirements as to the preparation of the gravel as to make the same more expensive and more costly than to get other material. The action of the said engineer and the other defendants in arbitrarily and wrongfully requiring that the plaintiff go to a large expense in treating said gravel, which requirement was wholly unnecessary, caused enormous losses to the plaintiff and broke said contract, damaging said plaintiff as hereinafter more particularly set forth.

The plaintiff further alleges that the said engineer and the other defendants, as members of the Board, and individually, were guilty of arbitrary and unreasonable conduct and action in the matter of handling gravel for use in the first course in said pavements. The

said Board designated that other gravel should come from a plac
called College Hill. In compliance with this designation on the pa
of the defendants, the plaintiff secured gravel from College Hill, an
said gravel was in effect approved by the Board, or some of them, an
they advised that the gravel was satisfactory. The plaintiff, relyin
upon said representations on the part of the members of the Boar
secured said gravel and paid large sums therefor [*the*] the defend
ants as a Board, paying so much royalty on each yard of grave
After the Board had thus in effect selected the place where the grav
should come from, and authorized the plaintiff to secure the grav
therefrom, the plaintiff went to work and secured the gravel from th
place thus designated by the Board, at great expense. Afterward
the Board unlawfully, [*wna*tonly] and unjustly, through the engi
neer, acting as a Board and individually, refused to allow the plain
tiff to use said gravel as it came from the pit, thereby break
31 ing the contract, and damaging the plaintiff in the sum
hereinafter set out.

The plaintiff further alleges as an illustration of the arbitrar
and wrongful action and conduct of the engineer and the othe
defendants, that in order to demonstrate that the gravel which ha
been designated by the defendants was proper gravel, and entirel
satisfactory in every way, the said defendants required the plaintif
to lay three half blocks with said gravel, one of which was laid wit
the gravel as it came from the pit and the others were laid after th
gravel had been treated as suggested by the engineer and the Board
The test of these three half blocks showed that the gravel which wa
used as it came from the pit was the very best material of the three
and notwithstanding that was shown, the said engineer arbitrarily
and wrongfully held that the gravel must be treated to suit him, an
to meet his personal judgment, notwithstanding the fact that sai
untreated gravel made a far better base than the treated gravel. I
this arbitrary action the Board arbitrarily and wrongfully uphel
the engineer, although the right was against the engineer and th
Board. This arbitrary action of the engineer and the Board caused
long, expensive and unnecessary delays, and thereby damaged th
plaintiff in large sums of money.

The plaintiff further alleges that the said engineer and the othe
defendants broke said contract arbitrarily and wrongfully, and in
jured and damaged the plaintiff in matters relating to the laying o
the asphalt of said pavements. The said engineer and the othe
defendants permitted and authorized the plaintiff to go to great ex
pense in preparing the streets for the laying of the asphalt, and per
mitted said plaintiff to go to heavy expense in bringing said asphal
to Texarkana and in getting the same ready to be laid down in th
pavements. The said engineer was in full possession of the facts
and had complete knowledge of all expenses to which plaintiff wa
going in securing this said asphalt, and in making preparations to
place it according to the contract, and the said engineer arbitrarily,
wrongfully and wantonly permitted the plaintiff to go to the expens
in laying the asphalt. After permitting plaintiff to go to the heavy
expense in securing said asphalt, the engineer arbitrarily, wrongfully

and wantonly stopped him from laying said asphalt on various pretexts [ans] excuses, and damaged the plaintiff in large soums of money. The said engineer would at one time contend that
32 the surface was too wet; in which the said engineer was wrong, and knew it was not too wet and knew that the asphalt could be properly laid, and yet he arbitrarily, unlawfully and wantonly ordered that the said asphalt be not laid, thus allowing the plaintiff to go to heavy expenses in shipping asphalt into Texarkana and returning same to the factory, shipping same back and forth and paying demurrage, etc., and otherwise damaging the plaintiff. This arbitrary, wanton and unlawful action as to asphalt commenced with the time when the asphalt began to be laid, and lasted throughout the time of the contract.

Plaintiff further alleges that the said engineer and the other defendants arbitrarily, in violation of the terms of the contract, decided in nearly all instances that the base on which the asphalt must be laid must be in effect equal to concrete base. The contract provided [fro] a gravel base, and yet the effect of the orders of the engineer and the other defendants was to make a concrete base out of a gravel base. This was impossible, and was known to the engineer to be impossible, yet by reason of his decisions he required enormous work to be done by the plaintiff, and thus causing the loss of time, expense, and other [itmes] hereinafter [refer-ed] to.

Plaintiff further alleges that the action of the said engineer and the Board and the other defendants was arbitrary, wrongful and wanton in respect to the matter of laying stone gutters. The Board and the members thereof, directed, permitted and authorized the plaintiff at great expense to lay stone gutters which was done by the consent and knowledge of said Board. Notwithstanding that was done by the consent and knowledge of the Board, thereafter the said engineer arbitrarily, wrongfully and wantonly, and without authority, ruled against the Board, and against the plaintiff, and thereby arbitrarily, and wantonly refused to give the plaintiff an estimate so that the plaintiff could be paid for said stone gutters, although said stone gutters were constructed by the direction of the Board.

Plaintiff further alleges that the said engineer and the other defendants were arbitrary, unreasonable, wrongful and unjust in the matter of giving directions as to the location of the stone gutter and the concrete curb and gutter, in this that the said engineer would designate one block and then arbitrarily and wantonly wait and delay unnecessarily until that block was completed, and would not designate any place the plaintiff could go after that block was
33 completed, and thereby the said engineer and the defendants caused the plaintiff great delay, damages and expense as herein set out. In addition thereto, the said engineer and the other defendants would arbitrarily designate a certain street or block, and then would change the designation after the plaintiff had gone to the expense, loss of time and money in locating material on that block, then the engineer and the other defendants would arbitrarily locate another block a long distance from the latter place, thus unneces-

sarily causing plaintiff to move material, machinery and men long distances, thereby causing great damages.

Plaintiff further alleges that from the commencement of said contract until it was terminated by the defendants, the said defendants, through its engineer and otherwise, caused the plaintiff innumerable unnecessary and unreasonable expense, and entailed [enormous] expense upon the plaintiff by reason of innumerable delays, which said delays continued from the beginning of the contract until the termination thereof. Plaintiff alleges that the defendants knew that the price of labor and materials was advancing, and notwithstanding that knowledge the said defendants arbitrarily and wantonly made such delays, regardless of the rights of the plaintiff, and continued such delays at great damage to the plaintiff from the beginning of said contract to the end thereof.

The plaintiff further alleges that by reason of the war conditions and the war laws and enactments passed by Congress, this plaintiff was delayed in the construction of said work, and was therefore [relieved] of the obligations of said contract, by reason of said war conditions and enactments, the country being at that time engaged in a war with Germany, and during the duration of said war Congress passed many acts requiring all the activities of the people to be devoted to the winning of the war. By reason of these war enactments and war conditions, the defendants herein were not entitled to take over the work and declare the contract annulled as hereinafter alleged.

In addition to the breach of contract, plaintiff alleges that the defendants, in the month of February, 1920, have wholly broken said contract, and have notified the plaintiff to cease work on same, to the great damage of plaintiff by reason of said breaches. Plaintiff alleges that it is able, ready and willing to complete the improvement under the terms of the contract, and would have completed them according to the terms thereof but for the arbitrary, wanton and unlawful conduct of the engineer and the other defendants as herein described.

34 The plaintiff performed its part of the contract, and was ready and willing at all times to perform same, and that the defendants broke the contract wantonly and unlawfully. The plaintiff further alleges that in the month of February, 1920, at the time the defendants broke said contract, said defendants wrongfully took over and converted to their own use the property of the plaintiff, and the property of the plaintiff so taken over and converted to the use of the defendants amounted to the sum named below, and is particularly described in the list set out [hereafter].

The plaintiff further alleges that the defendants broke said contract because they wrongfully and unlawfully retained in their possession, in violation of said contract, money earned by the plaintiff and belonging to the plaintiff under the terms of said contract. The plaintiff entered into the contract with the defendants with the distinct understanding that payments as provided for in the contract should be made monthly, and it is the universal custom on such contracts to make payments monthly, and the defendants failed to pay

the November, 1918, estimate, although the plaintiff was [rngaged] in carrying out the terms of the contract in strict accordance with the terms thereof.

The defendants also refused, unlawfully and wrongfully, to pay the December, 1919, estimate, although the said estimate has long since been due, and the November, 1919, estimate has long since been due. The plaintiff alleges that the itemized statement of the tools, materials, equipment and machinery unlawfully retained and taken over by the defendants and converted to their own use, and the value attached to each article, each piece of machinery, and each tool is shown below. In addition thereto, the plaintiff also alleges that the damages caused by the defendants by their breach of the contract as above set forth, are itemized, and said damages due to said breaches of the contract, and the property converted, showing the damages for such conversion of each and all of said property, and the damages due for the breaches of contract, are itemized and alleged to be as follows:

To extra thickness of asphalt caused by engineer compelling extra sweeping from the top of the base after same had been brought to grade, thereby lowering surface from one-half inch to one inch in thickness, and no way to bring same to grade except by additional thickness of asphalt on two-thirds of the pavement laid, or about,

35	40,000 sq. yds. @ 21¢ per sq. yd.....	8,400.00
	To curb and gutter rejected by the engineer on his claim that it was frozen or defective or for reasons he explained he did not know.	
	To taking out and replacing 410′ of 2′ Curb & Gutter @ 60¢	246.00
	To taking out and replacing gutter, error in grade by engineer 120′ of 12″ Gutter @ 25¢.....	30.00
	To taking up and relaying gutter, error in grade made by engineer 120′ of 24″ Gutter @ 40 [@].....	48.00
	To lost time of curbing crews, waiting on grade to set curb, and not having sufficient grade set ahead to work to advantage	1,550.00
	To extra cost for unnecessary moves of the asphalt force from one place to another, as many as two or three moves in one day	2,000.00
	To lost time of men and teams at Asphalt plant or on street, when either stopped by the engineer, or waiting at some place [fro] the engineer to designate where he would allow asphalt to be laid	3,000.00
		$15,274.00

Bill No. 1.

To 4,112′ of concrete curb and gutter with 7″ Apron @ 5¢	205.50
To 2,500′ of 15″ curb @ 5¢	125.00
To 6,000″ of concrete curb and gutter 12″ Apron @ 5¢	300.00
To increased concrete curb and gutter, 24″ apron from 8,600′ in contract to 17,522′ up to Dec. 1st, 1919, error made at time of making contract on this item of 15¢ per cu. ft., or 8,922′ increase at 15¢ per ft.	1,338.30
To 3,000 cu. yds. of existing gravel streets for base cut out @ 50¢ per cu. yd.	1,500.00
36 To profits on 67,000 yds. asphalt wearing surface @ 20¢ per yd.	13,400.00
To 23,436 yds. Asphalt Macadam Wearing Surface cut out @ 20¢	4,687.20
To 6,125 sq. Yds. of concrete pavement, cut out @ 20¢	1,225.00
To 7,000 yards of gravel " " " @ 10¢	700.00

Bill No. 2.

November 1919 estimate unpaid	6,585.12
Underestimated in gravel base to Dec. 1st, 1919	878.24
Work done in December 1919 unestimated	219.91
2-a Extra bills unpaid for 1917, 1918 and 1919	540.43
No. 3. Material bills	1,626.49
No. 4. Small tools	200.00
No. 5. Concrete tools and forms	310.00
No. 6. Scrapers and Dump Wagons	1,060.00
No. 7. Screening machinery	630.00
No. 8. Blacksmith outfit	150.00
No. 9. Asphalt Plant, Road Rollers, Tractor, Scarifier, heating kettle, Bot wagon, Broom	18,115.00
No. 10. Plows, Rooters & Extra Lays	232.50
No. 11. Ten Waterloo Wagons and one Austen grader	2,000.00
	$56,028.79
To deduction out of estimate No. 27, May 27th, for the cleaning of storm sewers and inlets	195.60
To retained percentage	13,752.45
	$69,976.84
	15,274.00
	$85,250.84

Premises considered, the plaintiff prays judgment against the above Improvement District Number [Twen-y] of the City
37 of Texarkana, Arkansas, John P. Kline, as a member of the Board and as an individual, Paul Huckins as a member

of the Board and as an individual, and Milton Winham as a member of the Board and as an individual in the sum of $85,250.84.

JAMES B. McDONOUGH,
Attorney for the Plaintiff.

Affidavit.

I, M. C. Burke, on oath state that I am an officer of the Burke Construction Company, and that the matters and things set forth in the above and foregoing complaint are true to the best of my knowledge and belief.

M. C. BURKE.

Subscribed and sworn to before me on this the 14 day of Feb. 1920.

H. B. WIER,
Notary Public.

[SEAL.]

My Com. expires July 28, 1921.

(*Second Amended and Substituted Complaint at Law in the District Court, Western District of Arkansas, in the case of Burke Construction Company vs. Board of Improvement of Paving Improvement District No. 20, etc., et al., No. 439.*)

THE BURKE CONSTRUCTION COMPANY, Plaintiff,

VS.

BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT NO. 20, of Texarkana, Arkansas, and John P. Kline, Paul Huckins, and Milton Winham, Members of said Board, Defendants.

The plaintiff, the Burke Construction Company, for the purpose of making its "amended and substituted complaint" more definite and certain, files this its second amended and substituted complaint, and for its cause of action herein against Paving Improvement District No. 20, of the city of Texarkana, Arkansas, and John P. Kline, Paul Huckins, and Milton Winham, as members of the Board of Improvement of said Paving Improvement District, says:

That the plaintiff was at and prior to the time of the execution of the contract hereinafter referred to, ever since has been and still is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and then was and still is a citizen
38 and resident of the State of Missouri; that the defendant, Paving Improvement District No. 20 of the City of Texarkana, Arkansas (hereinafter called the district) is an improvement district, a body politic and corporate, organized under the laws of the state of Arkansas, and is a citizen and resident of the county of Miller in said State. The defendant, John P. Kline is the Chairman of the Board of said District and is also a citizen and resident

of Texarkana, Arkansas; the defendant, Paul Huckins, is also a member of said Board and is Secretary thereof, and a citizen and resident of Miller County Arkansas, and the defendant, Milton Winham, is also a member of said Board and a citizen and resident of Miller County, Arkansas. Defendants are all domiciled in and citizens of the Western District of Arkansas, Texarkana Division, and this suit is of a civil nature and the amount in controversy, exclusive of interest and costs exceeds the sum of three thousand dollars.

Plaintiff alleges that the District was organized for the purpose of constructing certain paving improvements in the city of Texarkana, Arkansas; that the Board of Commissioners of said District advertised for bids and the bid of the plaintiff was by said District accepted and contract for construction of said improvement was awarded by said District to the plaintiff; that this contract was entered into for the work, pursuant to the bid of the plaintiff, on or about the 29th day of November, 1916, and one of the originals of said contract is in the possession of defendants and they are familiar with the terms thereof; a printed copy of the said contract is hereto attached marked Exhbiit "A" and made a part hereof.

Plaintiff alleges that defendants selected E. L. Petersen as Engineer for said District and that he has continued as such engineer from the time said contract was let and still is the acting engineer of said district.

Immediately after the execution of the contract referred to, plaintiff entered upon the construction of the improvements and would have long since completed the same in accordance with the terms thereof, but for the unlawful and wrongful breaches of said contract on the part of the defendants and the Engineer of said District, as is hereinafter set out.

Plaintiff alleges that after the execution of the contract and execution and delivery of bond by plaintiff to the District, it immediately began the preparations on an extensive scale for
39 the purpose of doing the construction work undertaken by it, and to that end immediately began and continued to assemble materials, tools and equipment for the purpose of doing said work, and soon had upon the ground materials, tools and equipment of the approximate value of ten thousand dollars, and the plaintiff stood ready to perform said contract and to begin the work.

Plaintiff alleges that the defendants and the engineer of said District well knew of these preparations being made and knew of the expense incurred by the plaintiff in preparing his outfits and assembling the same, but that notwithstanding such knowledge, said defendants and the engineer of said District arbitrarily and wrongfully failed and neglected to perform the contract on their part in this: That they then and there failed and refused to designate the places where plaintiff should begin work and thereby an unreasonable delay of some three weeks was caused to the plaintiff solely by reason of the wanton and wilful failure of the engineer and other defendants to perform said contract by giving such grades and designating the places of work in accordance with the terms thereof. That by reason of the neglect and failure on the part of the said

defendants and their engineer, the plaintiff has suffered damage in the sum of at least five thousand dollars.

The plaintiff alleges that in the contract entered into between the plaintiff and the defendant, as is shown on page 5 of said contract, it was expressly agreed between the plaintiff and the defendant that the plaintiff in the performance of said contract should construct 4,476 square yards of brick wearing surface as is shown in item No. 30 on page 5 of said contract. It was also expressly agreed that the plaintiff in the performance of said contract should construct 15,376 square yards of fibre brick wearing surface as is shown in item 30A on page 5 of said contract. It was also expressly agreed that the plaintiff in the performance of said contract should construct 23,436 square yards of asphaltic macadam wearing surface as is shown in item 32 on page 5 of said contract. The plaintiff in entering upon the performance of said contract brought all men, machinery, and tools to Texarkana for the purpose of economically constructing said brick macadam and asphaltic concrete wearing surface. In order properly to perform said contract within the time limited it was necessary and this was contemplated in the contract and known to both plaintiff and defendant that the plaintiff should employ at one and the same time different crews of men and should use different machinery and materials for the different kinds of surface pavement including all that above named and all that is specified on page 5 of said contract. The plaintiff had an organization of men, machinery, tools and machinery for the purpose of expeditiously and economically completing said contract within the original time named in said contract and but for the wrongful and unlawful acts of the defendants in the breach of said contract as herein specified the plaintiff could and would have fully completed said contract before the expiration of the time named in said contract. After the plaintiff had brought all its crews of men and its machinery appliances, tools and had arranged for material for the simultaneous construction of all of said surface pavement above mentioned and further described on page 5 of the contract, and after plaintiff had entered upon the construction of said contract with the view of prosecuting every part thereof simultaneously as the plaintiff could have economically done the defendants arbitrarily and in violation of the terms of said contract and wantonly required, through the engineer of the defendants the plaintiff to leave off the construction of the brick and macadam pavement and surface and place down only the asphaltic concrete wearing surface. By reason of that unlawful and wrongful action the defendants attempted to make a new contract between the plaintiff and defendants, being in that respect a different contract from the one entered into and by reason of such wrongful and unlawful action the defendants made it impossible for the plaintiff to complete said contract within the time originally provided in said contract. The plaintiff was thereby compelled to undergo the expense of bringing the crews required for the simultaneous construction of said various kinds of pavement to Texarkana,

and was compelled to keep said crews at great expense and was required to suffer great expense by reason of keeping said tools and men required for simultaneously doing the work as above alleged. The plaintiff alleges that but for said wrongful action of the defendants in endeavoring to make and enforce a contract different from the one actually entered into the said defendants prevented the plaintiff from performing its contract within the time required therein. The plaintiff alleges that by the wrongful decision, ruling and conduct of the engineer and the defendants as above set forth only one crew could be profitably working and only one kind of pavement could be laid down and that required a much longer time than would otherwise have been required, had the defendants legally and rightfully carried out the contract entered into. By
41 reason of the wrongful action of the defendants in requiring the brick and macadam pavement to be withheld and abandoned the defendants wrongfully and unlawfully deprived the plaintiff of the profits which it would have made in the completion of said contract in the time originally therein named. During the time within which the contract should have been completed and would have been completed, but for the above wrongful action of the defendants there was but little, if any rise in the price of labor and materials.

In order to perform the work named in said contract within the time limit fixed by said contract it was necessary that said work should proceed as a unit. As above stated the plaintiff brought its men and machinery to Texarkana prepared to proceed with all of said work and made contracts for material and began preparations to prosecute all of said paving at one and the same time and as a unit and requested the engineer to give the plaintiff directions so that the work could proceed as provided in the contract. The said engineer arbitrarily and wantonly refused to designate any streets for any pavements as provided in the contract except the asphalt pavement and thereafter the said engineer and the Board of defendants arbitrarily eliminated from the contract all of the macadam, all the concrete all the gravel and all the brick paving except about 5,000 to 7,000 yards of said brick pavement, and thus wrongfully and arbitrarily exacted of the plaintiff that it pave all of said streets with asphalt contrary to the terms of said contract as agreed to by the defendants hereto. After the first year within which the contract would have been completed, except for the wrongful conduct of the defendants, all of the asphalt pavement was laid at a loss and if the defendants had not wrongfully and arbitrarily cut out the other pavements above alleged the plaintiff could have and would have finished all of said work within the first year at a profit to the plaintiff in the sum of $23,589.15 as shown in the itemized statement fully set out below, and designated as bill numbered One.

The plaintiff, therefore, alleges that the defendants broke said contract by requiring the plaintiff to perform work not required under said contract and this breach of the contract has never been waived by the plaintiff.

Defendants and each of them and the engineer of said District,

after plaintiff was permitted to proceed with the work and was in fact proceeding therewith negligently and carelessly wholly failed, neglected and omitted to notify the Water Company and Gas
42 Company to lower their pipes in each and every one of the streets of said District, as was by the terms of the contract the duty of the defendants and the engineer of the district to do, and said engineer and the defendants likewise carelessly negligently and wantonly failed to cause said obstructions to be removed ahead of the work to the end that the same might proceed without delay as was their duty under the contract, notwithstanding they and each of them knew the work would be delayed and the contractor put to heavy expense by reason of delays on account of such obstructions; that by reason of such neglect or failure on the part of the defendants and their engineer, and each of them, the plaintiff was delayed in the performance of the work from the very inception until said work was shut down and that such action on the part of the defendants and their engineer was wanton and gross and wholly without excuse and retarded and delayed the work of construction in said District and caused disorganization of the work and disorganization of the contractor's outfit and likewise caused the plaintiff to suffer damage in the sum of at least Five Thousand Dollars, and in addition thereto prevented the performance of the work within the time required by the contract.

Plaintiff further alleges that from the very inception of the work until its close, it was delayed by reason of the negligence, failure and carelessness of the defendant and its engineer in failing to cause the streets to be freed from the obstruction of gas and water pipes and by reason of the failure and negligence of said parties to designate the places of work and to pass upon the material, and that such delays continued from the inception of the work until it was closed down in December, 1919, and by reason thereof the plaintiff was from time to time caused innumerable delays, his forces became disorganized and disheartened and the work was thereby retarded and by reason thereof the construction work was prevented from being done within the time required by said contract, all to the plaintiff's damage, as is herein set out.

Plaintiff says that repeatedly during its efforts to comply with the contract, it complained to the Board and to the individual members thereof of the arbitrary, wanton and wrongful acts and omissions on the part of its engineer both in writing and verbally, and that the Board in many instances waived written complaints and accepted oral complaints and at different times one or more members of the Board admitted that the engineer was in the wrong and promised that the arbitrary and wrongful acts of such engineer should
43 and would be corrected and frequently promised that such arbitrary and wrongful acts on the part of the engineer would cease and that the defendants would comply with their contract, but that the said defendants wholly failed to right such arbitrary, wanton and wrongful acts and omissions on the part of its engineer, but on the contrary continued to allow the same and continuously permitted arbitrary decisions to be made by such engineer in viola-

tion of the contract from the inception thereof until work ceased on the job.

Plaintiff says that the arbitrary, wrongful and unlawful acts and omissions of said engineer which resulted in breaches of the contract by the defendants and in damage to the plaintiff are in part particularly described as follows:

At the inception of said work the engineer negligently and carelessly and erroneously gave improper grades for the curbing; one of these erroneous grades being on Eleventh Street in said city of Texarkana; that pursuant to such location made by the engineer and under his supervision and instructions, plaintiff constructed the curb and gutter in accordance with the terms of the contract; thereafter, the engineer finding that he had made a mistake, arbitrarily, wrongfully and unlawfully required the plaintiff to correct the defect in the work caused by his own mistake and imposed upon the plaintiff the expense incident to his own neglect, and said engineer wrongfully and arbitrarily ruled that the expense incident to the correction of his own error must be borne by the plaintiff, and the defendants approved and unjustly and wrongfully endorsed the action of its engineer, thereby causing damage and injury to the plaintiff, as hereinafter set out.

Plaintiff further alleges that throughout the work from the beginning to the close, the said engineer carelessly made serious errors in locating the curbs, gutters and paving and that although such errors were due solely to his carelessness, negligence, and incompetency, nevertheless, he wantonly, wrongfully and unlawfully charged the plaintiff with the correction of such errors and continued to so charge the plaintiff with the correction of such errors from the inception of the work until the close thereof, and thereby damaged the plaintiff as is hereinafter more particularly set out.

Plaintiff further says that it was permitted by the engineer to place the curb and gutter on Hickory and Pecan Streets between Ninth and Sixteenth Streets, and that the said work was done under the supervision of the said engineer and with his approval
44 and that of the inspectors of the district on said work; that the same was done in all things in strict compliance with the terms of said contract, but notwithstanding such facts the engineer (the other defendants approving) arbitrarily, wantonly and illegally condemned a large part of said work as done on the false and pretended claims that it was frozen or for some other cause to plaintiff unknown, and arbitrarily and wantonly caused a large portion thereof to be torn out and replaced and wrongfully and illegally charged the expense thereof as against this plaintiff, notwithstanding said work in all things complied with the provisions of said contract, whereby plaintiff suffered damage as hereinafter set out. All the items of loss and damage in this paragraph are shown by a letter of the engineer of the defendants dated March 13, 1917, which letter is in possession of the defendants.

Said engineer likewise, the defendants concurring therein, often from time to time condemned, arbitrarily and wrongfully, other work done in the district, which was done in all respects in com-

pliance with the plans and specifications and under the supervision and directions of the engineer and the inspectors of the district, thereby causing enormous damage to the plaintiff and causing a disruption of his organization an da delay in the performance of his contract. That notwithstanding the contract permitted the plaintiff to use without treatment fourteen thousand cubic yards of gravel in the streets in said district for use in paving of such streets, and notwithstanding plaintiff's bid was made upon the express representations by the defendants that such gravel might be used without treatment, the engineer and other defendants arbitrarily and wrongfully refused to allow the use of such gravel without screening the same and wrongfully, illegally and arbitrarily required the plaintiff to screen and treat the said gravel so as to meet requirements not named in the contract, thereby entailing upon the plaintiff a great and unnecessary expense, causing him an enormous loss and delaying the completion of the contract beyond the time specified therein, and on this account, plaintiff suffered damage during the performance of the contract to the extent of at least seven thousand dollars.

Plaintiff further says that at and prior to the time that he placed his bid with the district for said work, it was represented by the said district that pit run gravel from the section in the city of Texarkana, known as College Hill would fully comply with the requirements of the contract for the first course of gravel to be used in the streets other than that gravel then being in such streets and the defendant Board designated gravel from College Hill as gravel to be used in compliance with the contract; the plaintiff secured the gravel from College Hill at the point designated by the Board and which said gravel was by said Board accepted as satisfactory; that relying upon said representations of the Board, it procured said gravel, paying large sums of money therefor to the defendant district, and after the Board had thus, in effect, selected the place where the gravel should be obtained and authorized its use, and notwithstanding the representations that pit run gravel might be used for the first course, the defendant and its engineer arbitrarily, wrongfully and unjustly refused to allow the plaintiff to use said gravel, but arbitrarily, wrongfully and unjustly required said gravel to be treated and screened when the same was not required by the terms of the contract, thereby entailing upon the plaintiff a great and unnecessary burden of expense and costs.

That the defendants and their engineer required the plaintiff to lay three half blocks of gravel, one-half block being laid with pit run gravel and the other two being laid with gravel treated as required by the engineer; that a test being thus made, the half block laid with the pit run gravel proved to be the very best of the three experiments, and notwithstanding such fact, the engineer of the district continued arbitrarily and wrongfully holding and requiring that the gravel obtained from such pits so designated by the Board must be treated to suit him and to meet his personal judgment, notwithstanding no such requirement was contained in the contract and notwithstanding the untreated gravel made a far better base and in that action, thus arbitrarily and wrongfully taken by the

engineer, he was upheld by the Board, thereby entailing upon the plaintiff a great and unnecessary expense, causing a long delay in the completion of the work and damaging the plaintiff in large sums of money.

Plaintiff further says that notwithstanding the gravel base under the contract was to be laid in two courses, and that it was contemplated and agreed that pit run gravel might be used for the first course, the engineer of the district arbitrarily, wrongfully and in violation of the term of the said contract, required that said gravel base be laid in four courses and required all of the gravel to be treated, and that after plaintiff had thus screened and treated the gravel and laid it in four courses the said engineer on each and every one of said streets would arbitrarily, wrongfully and
46 wantonly notwithstanding such work was done under his direct supervision and under that of the inspectors of said district, and in conformity with the instructions given, require the plaintiff at times to add more screened gravel, after having finished the work, and at other times to go back and take the screenings or squeege, as it was termed by the engineer, being the fine particles screened out from the gravel, and add to the work already done these small screenings which theretofore by the said engineer had been ordered to be screened out of the gravel, thereby entailing upon the plaintiff a great and enormous expense and causing numerous and extensive delays in the performance of the work, all in violation of the contract, and that the defendants as a Board, and individually, concurred in said illegal, wrongful and arbitrary actions on the part of the said engineer and that on account of the gravel being thus laid in four courses, screened gravel and other gravel mixed, the engineer required of this plaintiff much more rolling of the gravel than would have been required or would have been necessary had the said work been done in accordance with the manner specified in the contract. Plaintiff further says that the engineer and the defendants, in violation of the terms of the contract, and contrary to the spirit and letter thereof, continuously from the inception of the work until it closed down insisted and required that this plaintiff should, on a gravel specification, put in a base in effect equal to a concrete base for the asphalt; that notwithstanding the contract contemplated a gravel base, yet by the arbitrary, wrongful and illegal acts of the engineer, which were concurred in by the defendants, the plaintiff was required in effect to make a concrete base out of gravel material; that such a requirement was in fact impossible and was by the engineer at the time known to be impossible, and by reason thereof, the defendants violated and breached the contract.

That in addition to the expenses and delays caused and necessitated by said illegal and wrongful acts of the engineer and the defendants with reference to the said gravel, the said gravel being laid as screened gravel would not readily bind and could only be bound by extensive traffic thereon, and that often times, after having laid the base in the four courses and having in all things followed the directions and instructions of the engineer and having

completed various streets and especially those in the south portion of the district, in so far as the base was concerned, the said base by reason of the wrongful, illegal and arbitrary requirements of the engineer as to the screening of the gravel and by reason of its lack of binding qualities, would be washed away by rains when such streets would not have been injured had they been con-
47 structed as contemplated by the contract, thereby entailing enormous expenses on the plaintiff, requiring that is go back and replace this gravel work and causing great and unnecessary delays in the performance of the contract. Plaintiff says that by reason of the illegal and wrongful acts of the defendants with reference to the method of laying the gravel and the refusal to allow pit run gravel to be used and the requirement that the same be placed in four courses as is hereinabove set out, it suffered damage and injury to the extent of at least thirteen thousand dollars.

That plaintiff at great expense and with the knowledge of defendants and their engineer assembled tools and implements and procured a crew necessary for laying asphalt in the streets and caused to be shipped the necessary material therefor; that after beginning the asphalt work, the engineer of the defendants arbitrarily, wrongfully and wantonly from the inception thereof until the work was closed down, delayed and stopped the plaintiff from laying asphalt from time to time without any excuse whatever, upon various pretexts, at one time the engineer contending the surface was too wet, at another time that it had not been sufficiently prepared, when in fact and in truth it was not too wet and was fully prepared, and the engineer knew these facts; at other times the engineer, knowing the expense caused to plaintiff thereby, failed and refused to advise the plaintiff where it might place the asphalt; that he would never lay out the work in advance so that it might be conducted in an orderly way; that plaintiff never knew when it shut down at night upon what portion of the work asphalt might be laid the next day, or whether it might be laid at all; that without right or reason the said engineer arbitrarily and constantly caused plaintiff — move its outfit from spot to spot on said streets in laying asphalt, instead of allowing the plaintiff to proceed therewith in a connected and orderly way and that by such arbitrary, wanton, and unlawful action, the laying of the asphalt was delayed, plaintiffs' asphalt crew disrupted from time to time and that owing to such delays and failure to lay out the work, plaintiff was caused to sustain demurrage charges on materials and delays and expense incident to the stopping of the work, and the completion of the district was thereby likewise delayed and that the action of the engineer herein complained of was, by the defendants, in all things approved, to the damage of the plaintiff as hereinafter set out.

Plaintiff says that it was permitted by the Board and the members thereof at great expense to itself to lay stone gutters in said district and that its work in that respect was done by the consent and with the knowledge of the Board and that after said gutters were
48 laid, the engineer of said district, the defendants in all things approving his action, did arbitrarily, wantonly and without

right, overrule the action of the Board in permitting plaintiff to lay said gutters, and wrongfully and arbitrarily refused to give plaintiff an estimate of the work, although the said gutters were constructed by the direction of the Board and the District. All of said items in this paragraph are shown by the letter of the engineer of the defendants of August 3, 1917, which letter is in possession of the defendants.

Plaintiff further says that defendants and their engineer continuously from the inception to the close of said work pursued an arbitrary, unreasonable and wrongful course with reference to the stone gutter and concrete curb and gutter in this: That said engineer would designate one block for a particular kind of gutter and curb and then without right or reason, wrongfully and arbitrarily wait and delay until that block was completed without designating any other place at which plaintiff could put his crew organized for that purpose until after the work laid out had been finished and plaintiff's crew would then have to await the further directions of the engineer, and instead of laying out such work in a connected manner said engineer would cause the plaintiff with its outfit to jump from block to block and street to street, thereby causing plaintiff's outfit to await his pleasure in the matter of designation and make long and expensive moves with its materials and crews, thereby causing the plaintiff to move material, machinery and men long distances without right or reason to its great damage as hereinafter alleged.

Plaintiff says that notwithstanding the fact that the defendants and their engineer knew that materials and cost of labor were increasing materially from time to time, yet the said defendants and their engineer caused plaintiff innumerable, unnecessary and unreasonable delays hereinabove set out with full knowledge of the great expense to and regardless of the rights of the plaintiff, such delays continuing from the inception to the close of the work on the contract.

Plaintiff further says that in the month of May, 1919, while it was in all things performing its contract, it performed certain labor and services which entitled it to an estimate in the sum of at least $410.72, but that the said engineer of said district illegally, wrongfully and arbitrarily withheld and deducted from the estimate for said month of May, 1919, on account of alleged cost of cleaning storm sewer, inlets and grading parkings, the sum of $195.60,
49 and that the plaintiff has never yet been paid for the estimate for the month of May, and that the said deductions so attempted to be made by said engineer were arbitrary, wilful and wanton and constituted a breach of the contract.

Plaintiff further states that by the terms of said contract it was entitled to pay monthly on the estimates of the engineer for the work done the preceding month and that during the months of November and December, 1919, it performed work and labor in said district under said contract, and for the month of November it was entitled to be paid thereunder at least the sum of $6,585.12, being the November estimate, and that it performed work and labor in said district after the November estimate and which should have been paid for in

the December estimate in the sum of $219.91, all of which said work was performed in said district in accordance with the terms of said contract, and that for the November estimate the plaintiff was entitled to receive payment on or about December 5, 1919, and the December estimate should have been paid on or about the fifth day of January, 1920.

Plaintiff alleges that notwithstanding it performed the work and labor hereinabove specified during November and December and was entitled to be paid at the times hereinabove named, the said defendants wholly failed and refused to make said payments, and thereby in each instance and on accou-t of each failure first breached the contract and by reason thereof the plaintiff has become entitled to treat said contract as an end on account of each of said breaches.

Plaintiff alleges that the defendants concurred in each and every one of the arbitrary actions hereinabove referred to on the part of the engineer of said district and in all things approved his action done and taken thereunder and herein complained of, and thereby adopted his action as their action, and plaintiff says that each and every one of the actions, rulings and requirements of the engineer hereinabove set out and complained of constitute separate breaches on the part of the defendants and the district and that by reason of such actions, rulings and requirements, the defendants first breached the contract.

Plaintiff further states that soon after it entered into the contract hereinabove mentioned, this country entered the war with Germany and that by reason of the various enactments of Congress passed in aid of said war and by reason of [unfor-seen] conditions arising by reason of the war and said enactments and by reason of the conditions existing after war was declared and during the whole time of the duration of said war and for a long time thereafter, the plaintiff was unable to procure men and material and was hindered and delayed in the prosecution of said work and that such delays and hindrances so caused were [unfor-seen] contingencies due to the war and war conditions and not contemplated by the parties at the time of the execution of the contract, and plaintiff is in no wise responsible therefor.

Plaintiff alleges that it in all things performed the contract on its part, but that the defendants wilfully, wantonly and arbitrarily breached the contract in the various and several matters and things hereinabove specifically set out and that on or about the month of February, 1920, the said defendants, notwithstanding the fact that they had first breached the contract, notified this plaintiff to cease work under said contract and advised the plaintiff that said defendant district had under the alleged terms of said contract taken over said work and would itself complete it and that in so doing the defendants further breached the said contract.

Plaintiff alleges that, notwithstanding the plaintiff in all things performed its contract and was at all times ready, able and willing to perform and would have completed the contract long prior to the first of January, 1920, but for the illegal, wanton wilful and arbitrary acts of the engineer and the defendants, hereinabove described, the said defendants in February, 1920, not only notified this plaintiff to

cease work on the contract, but illegally and wrongfully claiming t
act under Section 16 of said Paving Contract took over and converte
to their own use the property of the plaintiff, as shown by an itemize
statement thereof hereinafter set out, which said property was of th
values hereinafter named, and that the said property so taken ov
was of the reasonable rental value of the sum of $2,000.00 p
month; the machinery, tools and equipment taken over and th
values thereof appear below on an itemized list.

By reason of the above breaches of the contract and by reason
the damages caused thereby, and by reason of the damages in add
tion thereto the plaintiff has been damaged by the defendants in th
total sum of $115,250.84, being the amount set forth in the origin
complaint herein less the deductions shown in the itemize
51 statement attached below. The said itemized statement sho
ing the damages claimed by the plaintiff because of th
wrongs of the defendants herein set forth is as follows:

Bill Number One.

On page 5 of the contract item No. 16 provides for 3,000 line
feet plain concrete curb, 18 inches deep complete in place.

Item No. 16A provides for 2,500 lineal feet plain concrete curb 1
inches deep complete in place.

Item No. 18 provides for 4,112 lineal feet combined concrete cur
and gutter with a 7 inch apron.

Item 19 provides for 6,000 lineal feet combined concrete curb an
gutter, 12 inch apron, said 6,000 lineal feet being between Eight
and Sixteenth Street- on Hickory and Pecan Street-.

As to item No. 16 above mentioned the defendants wrongfully an
entirely cut that item out of the contract.

As to item 16A, the defendants permitted the plaintiff to constru
only 503 lineal feet and cut out the remainder of that item.

As to item number 18, the defendants wrongfully cut out that en
tirely.

As to item 19, the defendants wrongfully cut out all of that ite
except 346 lineal feet.

The plaintiff therefore was permitted by the defendants to put i
only 849 lineal feet. The defendants excluded from said contra
15,612 lineal feet of said items 16, 16A, 18, and 19 expressly pro
vided for on page 5 of the contract. Under the contract as it wa
thus let and under the contract and under the conditions surround
ing the performance of said contract the plaintiff as above allege
would have made a profit on said items and said profit amounted t
and would have amounted to 5 cents per lineal foot, making a tota
loss of profit and damage to the plaintiff on these three items o
$738.15.

Item No. 20 on page 5 of said contract provides for 8,600 linea
feet of combined concrete curb and gutter with a 24 inch apron com
plete in place. In bidding on that item the plaintiff made an erro
in the calculation of 15 cents per lineal foot below the price tha
should have been bid on that item. Later the engineer's attentio

was called to this error and thereupon and without reason and
52 wantonly and in violation of the contract, after learning that this item would be placed in at a loss required the plaintiff to cut out the other items to 17,522 lineal feet, which construction was between Eighth and Sixteenth Streets and between Hickory and Pecan, the exact location being known to the defendants. That increase extended up to December 1, 1919 thereby wrongfully requiring the plaintiff to construct 8,922 lineal feet of that item at a loss of 15 cents per lineal foot making a total loss on that item of $1,338.80. This was wrongfully and wantonly done by the defendants and as the plaintiff believes, solely for the purpose of wronging and harassing the plaintiff.

As to item No. 29 page 5 of the contract it is provided that the plaintiff might use 3,000 cubic yards of existing gravel on the streets at a base of $5.50 per cubic yard. This item was wrongfully cut out by the defendants. The plaintiff had a profit of 60 cents per cubic yard in using said existing gravel on the streets as provided in the contract and the defendants wrongfully cut that out and thereby damaged the plaintiff in the sum of 50 cents per cubic yard, making a total damage on this item of $1,500.00.

In item No. 31 on page 5 of the contract it is provided that the plaintiff shall construct 67,239 square yards two inch asphaltic concrete wearing surface. By reason of the facts above set forth the plaintiff could and would have completed this 67,237 yards asphaltic concrete wearing surface within the time provided for in the contract, and but for the wrongs and breaches of the contract by the defendants as above set forth, the plaintiff would have within the time required completed this asphaltic concrete wearing surface at a profit of 20 cents per square yard to the plaintiff, making a total on this item of $13,400.

In item 32 on page 5 of the contract, it is provided that the plaintiff shall construct 23,436 yards 3 inches asphaltic concrete wearing surface. The defendants wrongfully cut out this entire item. The plaintiff except for the wrongs and breaches of the contract of the defendants would have completed this entire yardage within the time required in the original contract and would have made a profit within that time on this item of 20 cents per square yard, making a total loss on this item of $4,687.20.

Item No. 33 on page 5 of the contract allows the plaintiff to construct 6,125 square yards concrete pavement. The defendants as heretofore alleged wrongfully cut out that entire item. But
53 for the wrongs of the defendants the plaintiff would have completed this entire yardage within the time allowed in the original contract and would have made a profit thereon of 20 cents per square yard, making a total on this item of $1,225.00.

Item No. 34 on page 5 of the contract requires the plaintiff to construct 7,000 square yards gravel pavement. By reason of the wrongful actions of the defendants this item was entirely cut out. The plaintiff could have constructed this gravel pavement under the terms of the contract within the time allowed in the contract and would have made a profit on said construction of ten cents per square yard.

By reason of the wrongs of the defendants as above alleged they damaged the plaintiff in the sum of $700 on this item, making a total damage suffered by the plaintiff by reason of the wrongs and breaches of the contract of the defendants in this bill numbered one of $23,589.15.

Bill Number Two.

By reason of the breaches of the contract above set forth, and of the wrongs of the defendants said defendants have damaged the plaintiff and the plaintiff is entitled to recover the following sums, to-wit:

The November estimate 1919 still unpaid	$6,585.12
Work done in December 1919 for which no estimate has been given	219.91
Error in the estimates on the gravel base to December 1, 1919	878.24

This error of the defendants is due to an underestimate in the gravel base. The error consists of 3,378 yards at 26 cents per yard, and the various estimates given on that amount contain this error, said estimates being 3,378 yards less than the actual amount of gravel base constructed. By reason of the error of the defendants in making the estimates they underestimated the work actually done by 3,378 yards of gravel base. As provided in said contract on page 5, this gravel base was to be paid for at the sum of 26 cents per yard. This amount being wrongfully omitted from the estimates, said estimates are therefore erroneous to that extent and the plaintiff is entitled to recover that additional sum by reason of the estimates. The plaintiff further alleges that under estimate No. 27 made in May 1919 the defendants have wrongfully charged the plaintiff with $195.60 for cleaning storm sewers and inlets. By reason of that erroneous charge the plaintiff is entitled to recover from the defendants the sum of $195.60.

54 Bill No. Two A.

By reason of the wrongful acts of the defendants as herein alleged the said defendants required and caused the plaintiff to do extra work and to expend for labor and materials the following sums, which are hereby designated as Bill No. 2-A.

4/18/1918.—Extra labor, January 4, 5, 7, and 8, re-grading base at intersection of Third and Beech Streets, and re-filling hole made to repair water leak, caused by break in water pipe on Beach between Third and Fourth Sereets:

10 hours Labor at 30¢	3.00
30 " " 22½¢	6.75
5 " Team 50¢	2.50
Replacing 1 load gravel wasted out with mud	1.30
	13.55
Add 15%	2.03
	15.58

4/18/1918.—Extra labor January, 1918, refilling holes made in base and gravel, by repairing water pipes, on Beech Broad to Third Street (2 leaks) and repairing gutters torn out by such repairs:

5 hours labor at 30¢	1.50	
20 " " 22½¢	4.50	
2 loads gravel damaged and thrown out with mud and replaced	2.85	
Cement and sand used to replace gutter	1.00	
	9.85	
Add 15%	1.48	
		11.33

Extra labor, April 10, 1918, regrading Laurel Street 3d to 4th, caused by water leak at two places on Laurel 4th to 5th St. and a later break in water pipes on Laurel 5th to 6th; water running down and washing dirt away near gutters; had to throw mud out and fill back with dry material:

5 hours labor at 30¢	1.50	
10 hours labor at 25¢	2.50	
	4.00	
Add 15%	.60	
		4.60

Extra labor, April 13, and April 9, 1918, filling in holes left by repairs to water pipes, and repairing gutters torn out by such repairs, at two points on Laurel, 4th and 5th Streets:

10 hours labor at 32½¢	3.25	
10 hours labor at 25¢	2.50	
Cement and sand used repairing gutters	1.25	
	7.00	
Add 15%	1.05	
		8.05

55 Extra labor and material, March 5, 1918, raising sewer manhole and two inlet castings at the corners of Third and Ash Streets:

2 hours labor at 30¢	.60	
2 hours labor at 25 cents	.50	
1 sack cement	.70	
Sand and brick used	1.00	
	2.80	
Add 15%	.42	
		3.22

Extra labor January 1918, changing grade of two inlet castings at corner of Third and Beech Sts.:

3 hrs. labor at 30c	.90	
3 " " " 20c	.60	
1 sack cement	.70	
Sand and brick used	.50	
	2.70	
Add 15%	.40	
		3.10

Extra Labor, January 1918, changing grade of Inlet castings and sewer manhole castings at 4th and Pecan Sts.:

4 hrs. labor at 30¢	1.20	
4 hrs. labor at 20¢	.80	
Cement, sand and brick	1.00	
	3.00	
Add 15%	.45	
		3.45

Extra labor, Jany. 1918 changing grade of Inlet Castings and sewer, Manhole casting at 3rd and Pecan St.:

3½ hrs. labor at 30¢	1.05	
3½ hrs. labor at 20¢	.70	
Cement, sand and brick	1.25	
	3.00	
Add 15%	.45	
		3.45

Extra labor and material March 1918, putting in underdrain at 4th and Ash Sts. as per statement below:

4 hours Team labor, at 50¢	2.00	
14 hours labor, at 30¢	4.20	
8 hours labor, at 22½¢	1.80	
1 sack cement	.70	
Sand, gravel and brick	1.00	
	9.70	
Add 15%	1.45	
		11.15

Extra labor and material, October 1917, taking up and relaying Asphalt Pavement around leaky water valve on Pecan Street near 12th Street:

56	9 square yards Asphalt Top taken up and hauled away and replaced with new asphalt material, at 1.50 per sq. yd.		13.50

Extra labor during month of August, 1917, filling in four holes in gravel base on Pecan St. between 10th and 15th Sts. caused by leaky water pipes, Gravel base being taken out and the space filled back with concrete:

½ bbl. cement, at 2.00	1.00	
½ cy Gravel, at 2.25	1.12	
½ " sand, at 2.00	1.00	
4 hours labor, at .30	1.20	
8 hours labor, at .20	1.60	
1 " team	.50	
	6.42	
Add 15%	.96	
		7.38

Extra labor, Sept. 10, 1917, putting in valley gutter on 15th St. at intersection of Pecan St.:

6 hours labor at 30¢	1.80	
12 " " 20¢	2.40	
1¼ yds. gravel at 2.25	2.81	
¾ " sand at 2.00	1.50	
2¼ hrs. Team time .50	1.25	
1½ bbl. cement 2.00	3.00	
	12.76	
Add 15%	1.91	
		14.67

Extra labor and material, October 1917, putting in Valley Gutter at the intersection of Hickory & 7th St.:

10 hrs. labor at 30¢	3.00	
20 " " 22½¢	4.50	
5 " " 50¢	2.50	
10 sacks cement at 65¢	6.50	
15 cu. ft. sand at 2.00	1.10	
30 " gravel at 2.25	2.50	
	20.10	
Add 15%	3.00	
		23.10

Sept. 6, 1918, to taking up asphalt and replacing with concrete base and asphalt cover, opening 10-6 x 8-6, 10 sq. yds. over water leak, on Pecan & 4th 27.50

August 1918, to repair cut in Asphalt by Water Co. on Hickory near Third 7.50

July 25, to taking out gravel and replacing with concrete on 4th East of Hickory:

1 sack cement	.80	
Labor 2 hours, S. Greshner at 35¢	.70	
Drayage, and gravel hauled	.75	
	2.25	
Add 15%	.33	
		2.58

57 August 1918, To seven loads gravel placed in alley on 4th between Laurel and Hazel at 1.25 8.75

Add 15% 1.30

10.05

July, 1918—To putting in concrete and work over drain pipe on 5th and Laurel, 27' x 4' x 6":

2 cu. yds. of concrete at 12.50	25.00	
Add 15%	3.75	
		28.75

Sept. 23, 1918—To taking up and repairing concrete paving, Laurel and 5th:

12 hours labor, at 50¢ (3 laborers)	6.00	
7 sacks cement at 90¢	6.30	
1½ yds. gravel at 2.00	3.00	
¾ yds. sand	1.50	
(Size of patch 17' x 4 x 6)	16.80	
Add 15%	2.50	
		19.30
		60.68
		36.88
		23.80

October 1917, extra labor taking out old gutter and putting in new concrete sections on 9th St. between Hickory and Pecan Sts. () ct, 4th, 5th, and 6th):

15 hours labor at 30	4.50	
15 hours labor at 22½	3.38	
5 hours team at 50	2.50	
8 sacks cement at 65	5.20	
1 yd. sand	2.00	
2 cu. yds. gravel at 2.25	4.50	
	23.08	
Add 15%	3.31	
		26.39

December 1919, opening made by Gas Co., To taking up and relaying asphalt on Beach St. about 100' south of 3rd St., a strip 20' long x 6' wide, or 13⅓ yds. at 5.00 per yd 66.67

(The Gas Company refuse- to pay this bill on the ground that you informed them that the damage to the pavement was not caused by the Gas Company, which you confirmed in your letter of 1/24/1920, being a reply to our letter to you on Jan. 22, and to which we further made a reply Feb. 6, 1920.)

September 6, 1918, to opening by Water Company on Pecan St. near 4th, made by order of the Engineer 42.00

(This was prior to the time an agreement was entered into with the Gas and Water Companies for making repairs. The Water Co. refuse- to pay this bill on the grounds that they had not been notified by the engineer, the engineer refused to
58 allow same. Measurements were made by Mr. Will Kennedy and Mr. Galvin, Inspector for the Board.)

Nov. 3, 1919, expense labor, under pass at 6th and Walnut:

6 hours labor at 35¢	2.10	
11/ 6—27 hours " " 35c	9.45	
11/ 8—18 " " 35c	6.80	
11/25—35 " " 35c	12.25	
4 gals. of oil at 25¢	1.00	
		31.60
Expense labor, removing and placing stone header in front of Webber's residence on Walnut 5th-6th 11/14 to 29 hours at 35¢	10.15	
Manhole rim and cover, for Elm Broad and Third	20.00	
		74.75

11/29—Extra labor cutting out patches for Asphalt, Pecan Beach, etc.:

10 hrs. labor a 60c		6.00	
20 " " 35c		7.00	
			13.00
15% added (74.75)			11.21

To amount of October bill $105.00 but the 15% not included in bill 15.75

December 1919, extra labor, under pass on Walnut and 6th Street:

12/—	To 9 hrs.	Labor at	35c	3.15	
	9 "	"	50	4.50	
12/2	9 "	"	35	3.15	
	9 "	"	50	4.50	
12/3	9 "	"	35	3.15	
	9 "	"	50	4.50	
12/4	9 "	"	35	3.15	
	9 "	"	50	4.50	
12/5	18 "	"	35	6.40	
	9 "	"	50	4.50	
12/6	9 "	"	35	3.15	
	9 "	"	50	4.50	
To teams removing dirt 3 hrs. at 75c				2.25	
To 16 sacks cement at 1.00				16.00	
To 2 yds. sand at 2.50				5.00	
To ½ yd. gravel at 2.50				1.25	
To 1,111 brick on street at 21.00				23.10	
				96.65	
Add 15%				14.50	
					111.15
					$528.30

The plaintiff is entitled to recover by reason of the facts above alleged and on the items set forth above in bill numbered Two-A, the sum of $528.30.

Bill Numbered Three.

The defendants, after the breach of said contract by the defendants wrongfully took over and converted to their use certain
59 materials particularly itemized and described as follows:

57 bbls. asphalt on ground and 25 bbls. in kettles, or 15-1/10 tons at 24.40 per ton	368.44
1 car limestone dust, sacks inc. 33 ton	331.02
(236 sacks Portland Cement, sx. inc. at 3.80 bbl.) 70 yds. Joplin Chatts, inc. freight at 3.90 yd.	273.00
70 " Fulton sand, at 2.70	189.00
35 " Tillson Sand at 1.95	68.25
20 tons coal at 6.00	120.00
1 bbls. crude oil	7.50
½ bbls. lubricating oil	12.00
½ bbl. coal oil	5.10
	$1,374.30

The reasonable value of said materials are as set forth in the above itemized statement and the defendants on those items by reason of their wrongful conduct as above set forth damaged the plaintiff in the sum of $1,374.30.

Bill Number Four.

The defendants by reason of their wrongful conduct as above alleged took and converted to their own use the small tools belonging to the plaintiff amounting to a total value of $200.00 and described as follows:

Small tools consisting of picks, shovels, grub hoes, asphalt rakes, and tampers, asphalt small tools, wrenches, and miscellaneous tools.

The defendants by converting said tools to their own use damaged the plaintiff in the sum of $200.00.

Bill Number Five.

The defendants took over and converted to their own use wrongfully and in violation of the plaintiff's rights as herein alleged concrete tools and forms described as follows:

4,000 ft. of concrete lumber at 35.00	140.00
Steel and wood frames	100.00
200 feet of hose	40.00
Four concrete wheel barrows	30.00
	310.00

The defendants by reason of their wrongful conduct damaged the plaintiff on that item in the sum of $310.00

60 Bill Number Six.

The defendants took over and converted to their own use certain scrapers and dump wagons more particularly described as follows:

8 National Dump wagons, at 50.00	400.00
3 Watson dump wagons, at 60.00	180.00
1 water tank wagon	75.00
1 street dump board	10.00
2- 6 x 16 - 2" pine concrete mixing boards	20.00
1- 4 x 8 - 2" pine mixing boards	10.00
	695.00

The plaintiff alleges that the defendants took over and wrongfully converted to their own use the said scraper and dump wagons and the value of said scrapers and dump wagons was as above set forth, and said defendants thereby damaged the plaintiff on this item in the sum of $695.00.

Bill Number Seven.

The defendants wrongfully took over and converted to their own use screening machinery consisting of the following:

1 revolving screen with motor power	600.00
6 Hand screeners	30.00
	630.00

The said screening machinery was reasonably worth the sum of $630.00. By reason of the wrongful conduct of the defendants in taking over said machinery and converting the same for their own use the defendants have damaged the plaintiff in the sum of $630.00.

Bill Number Eight.

The defendants wrongfully took over and converted to their own use the blacksmithing outfit of the plaintiffs. Said blacksmithing outfit consisted of the following items with a total value of $150.00:

Forges, anvil, pipe cutting tools, dies and taps, blacksmith vice, and pipe vices and miscellaneous tools and materials on hand.

By reason of the wrongful conduct of the defendants they have damaged the plaintiff in said sum of $150.00.

61

Bill Number Nine.

The defendants by reason of their breach of said contract and their other wrongful conduct, took over and converted to their own use the machinery belonging to the plaintiff which said machinery and the value of each item is as follows:

1 Standard Asphalt Plant on railway trucks, complete	10,000.00
1 Heating Kettle, new, used on street	200.00
1 Steel hot wagon, new, used on street	150.00
1 Kelley Tandum Asphalt 8 ton steam roller	2,500.00
1-10 Ton 3 wheel steam street roller	1,800.00
1-40-60 oil Reeves Tractor, cost new 4,100 used 2 yrs.	2,500.00
1 Blade road grader	250.00
1 heavy road drag harrow	15.00
1 all steel scarifier	600.00
1 broom	100.00
	18,115.00

By reason of the wrongful action of the defendants in taking over and converting this machinery as above set forth to the use of the defendant said defendants have damaged the plaintiff in the sum of $18,115.00.

Bill Number Ten.

The defendants by reason of their breach of said contract and their wrongful conduct as above set forth took over and converted to their own use plows and other tools belonging to the plaintiff. The said plows and other tools are itemized with their values as follows:

1	No. 3, R. R. plow	40.00
2	No. 5, R. R. plows	70.00
2	Hard Pan Rooters	90.00
2	Extra No. 3 Plow Lays	13.00
3	" No. 5 Plow Lays	19.50
		232.50

By reason of the wrongful conduct of the defendants in taking over the above named plows and other tools the plaintiff has been damaged in the sum of $232.50.

62 Bill Number Eleven.

The said defendants by reason of their wrongful conduct took over and converted to their own use in the breach of their contract ten steel wagons and one Austin Grader. The said ten steel wagons were worth $125.00 each and the Austin grader was worth $750.00. By reason of the wrongful conduct of the defendants in taking over these wagons and grader said defendants damaged the plaintiff in the sum of $2,000.00.

Bill Number Twelve.

The plaintiff alleges that by reason of the wrongful conduct and actions of the engineer and the defendants herein the said defendants compelled and required the plaintiff in violation of said contract to expend the sum of $15,274.00 in labor and material as shown below.

To extra thickness of asphalt caused by engineer compelling extra sweeping from the top of the base after same had been brought to grade, thereby lowering surface from one-half to one inch in thickness, and no way to bring same to grade except by additional thickness of asphalt on two-thirds of the pavement laid or about, 40,000 square yards at 21¢ per square yard.....	8,400
To curb and gutter rejected by the engineer on his claim that it was frozen or defective or for reasons he explained he did not know, to taking out and replacing 410′ of 2′ curb and gutter, at 60¢.....	246

To taking out and replacing gutter, error in grade made by engineer, 120′ of 12″ gutter at 25¢ on North 10th St. west of Hickory Street..... 30.00

To taking up and relaying gutter, error in grade made by engineer, 120′ of 24″ gutter at 40¢..... 48
(Between 12th and 13th St. on Hickory.)

To lost time of curbing crews waiting on grade to set curb, and not having sufficient grade set ahead to work to advantage..... 1,550

To extra cost for unnecessary numerous moves of the asphalt force from one place to another, as many as two or three moves in one day..... 2,000

63 To lost time of men and teams at asphalt plant or on street, when either stopped by the engineer or waiting at some place for the engineer to designate where he would allow asphalt to be laid..... 3,000

$15,274

The defendants wrongfully required the plaintiff to do the extra sweeping mentioned above to his damage in the sum of $8,400, thus wrongfully compelling the plaintiff, in violation of the contract to expend that sum. The defendants wrongfully rejected the curb and gutter referred to above, amounting to $246.00. By reason of the wrongs and breaches of the contract of the defendants hereinabove described the said defendants damaged the plaintiff by reason of the items above set forth in said Bill numbered Twelve, in the total sum of $15,274.00. The plaintiff alleges that by reason of the unlawful breaches of the contract hereinbefore set out the defendants have damaged the plaintiff as above set forth in the total sum of $115,250.84, less the sum of $919.24, to be taken out of bills numbered three and six, which leaves a total damage to the plaintiff of the sum of $114,331.60.

Wherefore, premises considered the plaintiff prays judgment against the defendants for all of the damages sustained by the plaintiff in the total sum of $114,331.60 and all costs in this action laid out and expended. The plaintiff further prays that if the court should hold that the plaintiff is not entitled to recover for the reasonable value of the personal property converted by the defendants then the plaintiff is entitled to recover the reasonable rental value of said property and all damages done to said personal property by the defendants.

Premises considered, the plaintiff prays judgment for the above sum and costs.

JAS. D. HEAD AND
JAMES B. McDONOUGH,
Attorneys for Plaintiffs.

Affidavit.

Comes M. C. Burke, and on oath says that he verily believes the matters and facts set out in the annexed and foregoing second amended and substituted complaint, to be true.

—— ——.

64 Subscribed and sworn to before me on this the —— day of April, 1920.
My Commission expires:

—— ——.
Notary Public.

Endorsed: Filed in the District Court on April 27, 1920.

(*Answer and Counter-claim of Defendant, Board of Improvement, etc., in Law Case No.* 439.)

1.

Now comes the defendant, the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, by W. H. Arnold and Frank B. Quinn, its attorneys, and not waiving the rights of the defendant under the demurrer, motions to strike and motion to make more specific, but still insisting upon the said demurrer and motions, the defendant for answer herein to the complaint of the plaintiff and for counterclaim against said defendant, The Burke Construction Company, alleges, states and says:—

The defendant states that it has not knowledge or information sufficient to form a belief as to whether or not the plaintiff, The Burke Construction Company, is now a corporation existing under and by virtue of the laws of the State of Missouri and therefore denies that it is such corporation; and this defendant shows to the Court that by an order of this Court heretofore made on the — day of May, 1920, the Paving Improvement District No. 20 was not to be treated as a defendant herein, but that this case should proceed against the Board of Improvement of said District only, and this defendant denies that Paving Improvement District No. 20 is a body politic or corporate under the laws of the State of Arkansas, and alleges that it is not answerable herein on account of not having been served with process and not capable of suing or being sued, and this defendant is answering only for the Board of Improvement of said District, which the defendant admits is composed of John P. Kline as Chairman, Paul Huckins, as Secretary, and Milton Winham, and admits that they are resident citizens of Miller County, Arkansas.

Defendant admits that said district was organized for the purpose of constructing certain paving improvements in the City of Texarkana, Arkansas, and alleges that the object of said organization was

65 the grading and subsurfacing with gravel or concrete, or other suitable material, of the streets within said territory, and by curbing, guttering and paving the said streets with cement, concrete, asphalt, asphaltic macadam, bitumen, bitulithic, creosoted wooden blocks, bricks, or any or either of said materials, and admits that the said plaintiff and defendant entered into a contract for the construction of said improvement, and defendant admits that while the contract bears date, as alleged in the complaint, of the 29th of November 1916, that said contract was not executed or the bond delivered until December 22, 1916, and defendant admits that it is familiar with the terms of the contract for said improvement, and it denies that Exhibit "A" attached to the complaint is a copy of said contract.

The said defendant denies that immediately after the execution of the contract referred to plaintiff entered upon the construction of the improvements, or that it would have long since completed the same in accordance with the terms thereof but for unlawful and wrongful breaches of contract on the part of this defendant, or the engineer of said district, as alleged in said complaint. Defendant denies that after the execution of the contract and the execution and delivery of the bond by plaintiff to the district, it immediately began the preparations on an extensive scale for the purpose of doing the construction work undertaken by it, and denies that it immediately began and continued to assemble materials, tools and equipment for the purpose of doing said work, and denies that it soon had upon the ground materials, tools and equipment of the approximate value of Ten Thousand ($10,000.00) Dollars, and denies that the plaintiff stood ready to perform said work, or to begin said work. Defendant denies that the engineer of said district knew of said preparations being made, or that the plaintiff incurred expenses in preparing its outfit and assembling the same, and denies that said defendant and said engineer arbitrarily and wilfully failed and neglected to designate a place where plaintiff should begin work, or thereby caused an unreasonable delay of three weeks for the plaintiff to begin said work, or that they wantonly or wilfully failed to give plaintiff grades and designate places of work according to the terms of the contract, and denies that the plaintiff was damaged in the sum of Five Thousand ($5,000.) Dollars, or any other sum by reason thereof. The defendant alleges that the said engineer promptly furnished grades and places for work as required by the contract whenever called upon.

66

2.

The defendant calls the court's attention to the fact that it is alleged in the complaint that on page 5 of the contract that certain amounts and classes of work were required to be done, whereas the said page 5 is only a part of the original proposal by said plaintiff to do certain work which was subsequently merged into the contract as shown on page 10 of the specifications and contract as entered into by the parties to this suit, which differs from the said page 5 with reference to quantities of yardage of the various kinds of paving.

Defendant denies that the contract between plaintiff and defendant agreed that 4,476 square yards of brick surface should be constructed, and denies that it was agreed by said contract that 15,376 square yards of fiber brick wearing surface should be constructed, and denies that it is agreed by said contract that 23,436 square yards of asphaltic macadam wearing surface should be constructed. The defendant states that the correct quantities of the said items, mentioned are 4,000 square yards of two and one-half (2½) inch vertical fiber brick 10,000 square yards of three inch vertical fiber brick and 10,000 square yards of asphaltic macadam.

Defendant states that said quantities specified by the contract were subject to charge by this defendant either by adding to any of said units, reducing or omitting same entirely, and the defendant here refers to page ten of said contract where said quantities are named and the words "more or less" referring to the said quantities are used following each unit, meaning that the amount specified should be changed according to the judgment of this defendant. Also on page 7 of the specifications and contract in which the following language is used: "Party of the Second Part to carry out and complete in a good, firm and substantial manner all or any part of the paving improvements to be constructed in said Improvement District." And paragraph 2 of Section 2, page 8, where the following language is used:

"The Engineer shall have the option of making changes in the line, grade, form, plan, position, dimensions or material of the work contemplated, either before or after its construction has commenced. Important changes such as involve a material increase in the cost, shall receive the previous approval of the Board. If such alterations diminish the quantity of the work to be done, they shall not constitute a claim for damages for anticipated profits for the work dispensed with."

67 And Section 18, Page 12 of the Plans and Specifications which reads as follows:

"The Board may, when deemed necessary, make alterations and modifications in the specifications and plans for the work, or may omit from the work covered by this contract any portion thereof, or may order extra work done, the price to be paid for work under such altered and modified contract shall be agreed upon in writing, endorsed upon the original contract, and signed by both parties to this contract. And it is expressly agreed and understood that such alterations, additions, modifications or omissions shall not in any way violate or annul said contract, and the Contractor hereby agrees not to claim or bring suit for any damages, whether for loss of profits or otherwise, on account of these changes, whenever, during the progress of the work, any additional work, or change, or modification in the work contracted for, is agreed upon as aforesaid, such additional work or addition or modification, shall be considered and treated as though originally contracted for, and shall be subject to all the terms, conditions and provisions of the original contract."

The defendant denies that the plaintiff in entering upon the performance of said contract brought men, machinery and tools to Tex-

arkana for the purpose of economically constructing said brick and macadam wearing surface. Defendant denies that the plaintiff brought different crews of men or different machinery and materials for different kinds of said paving; denies that the plaintiff had or assembled an organization of men or machinery or tools or equipment necessary to the expeditious or economical completion of the said contract within the original time named therein; denies that because of any wrongful or unlawful act of the defendant the plaintiff was prevented from completing the said contract before the expiration of the time therein named. Defendant denies that it arbitrarily or in violation of the terms of said contract, or wantonly required the plaintiff to leave off the construction of the brick and macadam paving, or that the defendant required only the putting down of the asphaltic concrete wearing surface; denies that any requirement was made in regard to leaving out any of said pavement which had the effect of making a new contract between the plaintiff and the defendant, and denies that any different contract from the one originally entered into has been required of the plaintiff; denies that there has been any wrongful or unlawful action of the defendant which has made it impossible for the plaintiff to complete the said contract within the original time.

68 Defendant denies that the plaintiff has been caused any expense of bringing crews required for the simultaneous construction of the various kinds of pavement to Texarkana by reason of any action of this defendant; denies that the plaintiff has been put to any expense by reason of keeping said crews, and denies that the plaintiff had separate crews for the carrying on simultaneously of the various kinds of pavement under the said contract. Defendant denies that it endeavored to make and enforce a contract different from the one actually entered into, and denies that by reason of any wrongful acts of said defendant the plaintiff was prevented from performing his contract within the time required, and denies that by wrongful decision, ruling or conduct of the engineer or the defendant above set forth only one crew could be profitably worked and only one kind of pavement could be laid down and that it required a longer time than would otherwise have been required. It is not true that the defendant required the brick and macadam pavements to be withheld and abandoned, or that said defendant has deprived the plaintiff of the profits which it would have made in the completion of said contract in the time originally named therein, or that during the time within which the said contract should have been completed that there was little rise, if any, in the price of labor or materials.

It is not true that the plaintiff brought its men and materials to Texarkana prepared to proceed with all of said work and made contracts for materials and began preparations to prosecute all of said paving at one and the same time and as a unit, or that said plaintiff requested the engineer to give plaintiff directions so that the work could proceed as provided for in the contract, and that said engineer arbitrarily and wantonly [re*g*used] to designate any streets for any pavements as provided for under the contract, except asphalt pavements, or that thereafter said engineer and the defendant arbitrarily

eliminated from the contract all of the macadam, all the concrete, al
the gravel and all of the brick paving except five to seven thousand
yards of said brick paving; said allegations are all untrue and un
founded, and said plaintiff acquiesced and agreed to the characte
and amount of each class of pavement as the same has been made, and
said plaintiff is estopped from making claim that charges have been
made in said contract, having agreed in all respects to everything
which has been done under said contract.

It is not true, as alleged, that after the first year all the asphal
pavement was laid at a loss, and while it is true that the plaintiff could
have completed the entire work within one year, its failure to
69 do so was its own fault, incompetency, carelessness, indiffer-
ence and negligence and was not due to any act of the de-
fendant herein; and it is not true that the plaintiff sustained damage
in the sum of $23,589.15, alleged loss of profits, on account of any act
of the defendant, which prevented it from completing said work
within the first year, and it is not true that it would have made
such profits. It is not true that the defendant broke said contract
by requiring the plaintiff to perform work not required under said
contract, and it is not true that the plaintiff has never waived
such breach, if any occurred; on the contrary plaintiff agreed and
acquiesced in all respects in laying the kind of pavement that was
laid up to the time of its abandoning said work, and plaintiff is
estopped from claiming that any other class of pavement should have
been laid. The contract calls for one hundred thousand (100,000)
yards of asphaltic concrete, and it is not true that any greater amount
of paving of that kind has been done than said contract provides for.
The entire amount of said asphaltic concrete which has been laid
down is about 64,000 yards, and this defendant expects and requires
that said plaintiff shall put down 36,000 yards of asphaltic concrete
in addition to what has already been put down; also the full amount
of 14,000 yards of the brick pavement called for in the contract and
6,000 yards of concrete and 2,000 yards of asphaltic macadam, and
the aggregate amount of said pavement should cover the area which
is contemplated in the contract between the plaintiff and defendant.

3.

Defendant denies that it negligently and carelessly and wholly
failed, neglected and omitted to notify the Water Company and the
Gas Company to lower their pipes in each of the streets of said dis-
trict, and denies that by the terms of the contract it was the duty of
this defendant or its engineer to do so, and denies that said engineer
and defendant carelessly, negligently and wantonly failed to cause
said obstructions to be removed ahead of the work to the end that
the same might proceed without delay, and denies that it was their
duty under the contract so to do, and denies that said plaintiff was
put to heavy expense by reason of delays on account of such ob-
structions, and denies that the plaintiff was delayed in the per-
formance of the work from inception until the said work was shut
down, and denies that defendant was guilty of any act that was

wanton and gross, or that retarded and delayed the work of construction in said district, or that they did any act which
70 caused disorganization of the work and contractor's outfit, or caused plaintiff to suffer damage in the sum of $5,000.00, or any other sum, or that such acts prevented the performance of the work within the time required by the contract. Defendant further denies that plaintiff was delayed by reason of the negligence, failure and carelessness of defendant or its engineer in failing to cause the streets to be freed from obstruction of gas and water pipes, or by reason of the failure and negligence of said defendant to designate any place of work and to pass upon material.

The defendant specially pleads the following provisions of the contract under which said work was to be constructed:

(See paragraph 2 under head of General, page 1.)

"Before submitting proposals, bidders shall personally inspect the territory in which the work is to be performed, as no consideration will be given to claims for extra compensation by the contractor for unforeseen or unexpected conditions he may encounter, or allege to exist, as the work proceeds."

And Section 6 on page 9 from which the following is quoted:

"The contractor shall take all responsibility for the work, and take all precautions for preventing injuries to persons and property on or about the work; shall bear all losses resulting to him on account of the amount or character of the work, or because the nature of the ground on which the work is done is different from what was estimated or expected or on account of the weather, floods, elements or other cause."

And the following on page 18 under the head of Protection of Pipes, etc.:

"In addition to the necessary sheeting and bracing of the trench, all pipes or conduits encountered in excavating the trench shall be carefully supported and protected, and if injured, shall be repaired or replaced as directed and at the expense of the contractor."

The defendant states that notwithstanding it was not required by the contract, or by law, to notify the water and gas companies to lower their pipes that they did cause notice to be given, and subsequently, after the contract was under way under subcontractors, they took the matter up with the City Council of Texarkana, Arkansas, and an amicable agreement was reached by said defendant and the City Council on the one side and the said service companies
71 on the other whereby the service pipes and mains of said companies were removed or lowered. It is not true that the plaintiff was damaged in any sum whatever on account of water or gas pipes being in the way of said construction.

4.

The defendant denies that the plaintiff repeatedly complained to the board, and to the individual members thereof, of arbitrary and wanton acts and [ommissions] on the part of defendant's engineer, both in writing or verbal, or that the board in many instances waived written complaints and accepted oral complaints, or that the board admitted that the engineer was in the wrong and promised that the arbitrary and wrongful acts of said engineer should and would be corrected. The defendant denies that it continuously permitted arbitrary decisions to be made by such engineer in violation of the contract from the inception thereof until the work ceased on the job, or at any time between said periods. The defendant at no time avoided or refused to take up and consider any and all matters of dispute that arose between said engineer and the plaintiff, and the defendant alleges that the said engineer did no act which was arbitrary, wanton or wilful for the purpose of obstructing the work, but he was actuated by a desire to have said work completed in an expeditious and efficient manner, and according to the plans and specifications embraced in the contract between the plaintiff and the defendant, and this defendant was actuated by no wantonness or [arbitrafiness] in passing upon any and all matters which were brought before said board by the plaintiff, and likewise strongly desired that said work should be pushed and completed as speedily as possible according to the terms of said contract, but this defendant alleges that the plaintiff did not evince a desire or effort to complete the said contract expeditiously, or in compliance with the contract, but that the plaintiff caused the same to drag along through the original time for its completion without doing much work and without providing sufficient men and materials to do said work, and that when an extension was made for doing said work from November, 1917, to November, 1918, the plaintiff promised to complete said work within that time, but failed and refused to supply men and materials or to carry out said work within said extended time, and the contract was then extended from November, 1918, to November, 1919, as hereinafter shown, upon the promise of the plaintiff to carry out said work according to said contract within said time, but said plaintiff refused to provide men and materials to carry out said work,
or to complete said work, and, on the contrary, instead of
72 trying to complete said work during the original time or the
two extended years it failed and refused to do so, and the plaintiff evinced a design and purpose of avoiding said contract and failed and refused not only to complete the same but to do the work in an efficient manner, and the allegations of complaint with reference to the conduct of the engineer solely rests upon the fact that the said engineer was requiring the plaintiff to comply in a substantial manner with the terms of the contract, and the defendant alleges the truth to be that said engineer favored plaintiff in the prosecution of said work as much as it was possible for him to do consistent with the rights of the district.

5.

It is not true as alleged that the said engineer negligently, carelessly and wrongfully gave improper grades upon Eleventh Street in the City of Texarkana, Arkansas, and pursuant to such location plaintiff constructed curb and gutter in accordance with the contract, and that thereafter the engineer, finding that he had made a mistake, arbitrarily, wrongfully and unlawfully required the plaintiff to correct the defect in the work caused by his own mistake and imposed upon the plaintiff the expense incident to his neglect, or that said engineer wrongfully and arbitrarily ruled that the expense incident to the correction of his own error, should be borne by the plaintiff. And defendant further denies that said engineer carelessly made serious errors in locating the curbs, gutters and paving, or that the same was due to his carelessness, negligence and incompetency, and denies that the plaintiff was charged with the correction of such alleged errors or that the plaintiff was damaged thereby.

It is not true that the defendant's engineer arbitrarily, wantonly andillegally condemned a large part of the [crub] and gutter which was put in on Hickory and Pecan Streets between 9th and 16th Streets, or that he wrongfully caused a large portion thereof to be taken out and replaced, and it is not true that said work complied with said contract; such of said curb and gutter as was rejected by said engineer was correctly and properly rejected because the same did not comply with the contract.

6.

In answer to all the allegations which are interspersed throughout the complaint under the various alleged causes of action of the plaintiff that the engineer of the district was unfair, unreasonable and arbitrary in requiring the plaintiff to conform to the contract, this defendant says: It is not true that the engineer of this defendant often from time to time arbitrarily and wrongfully condemned other work in the district which was done in compliance with the plans and specifications of the contract, or that the plaintiff was thereby caused enormous damages, or that his organization was disrupted thereby or that the same caused a delay in the performance of the contract. It is not true that the contract permitted the plaintiff to use without treatment 14,000 cubic yards of gravel in the streets in said district for use in paving of such streets; that it is not true that the plaintiff's bid was made upon the expressed representation by the defendant that such gravel might be used without treatment, and it is not true that the plaintiff was subjected to great and unnecessary expense on account of screening and treating gravel, or that he suffered loss and was delayed in the completion of the contract, or that it suffered damage thereby in the sum of $7,000.00. The defendant only required the plaintiff to furnish gravel according to the terms of said contract, and it became

73

necessary for the plaintiff to screen said gravel in order that the gravel and fine material should meet the requirements of the contract.

7.

The defendant denies that it was represented by said district that pit-run gravel from the section of the City of Texarkana known as College Hill would fully comply with the requirements of the contract for the first course of gravel to be used in the streets. It was immaterial with the defendant where plaintiff procured said gravel, but this defendant expected and required the plaintiff to secure and furnish and lay the kind and quality of gravel specified in the contract and in the relative proportion of gravel and fine material; and while it is true that defendant knew that plaintiff was getting gravel from College Hill as a source of supply, the defendant at no time waived the specifications of the contract with reference to the kind of gravel and the proportions of gravel and fine material required by the contract. It is not true that the defendant represented to the plaintiff that pit-run gravel might be used for the first course, inasmuch as the pit-run gravel did not contain the proportions of gravel and fine material, and it is not true that said pit-run gravel met the requirements of said contract for any part of the gravel base. The defendant alleges that three half blocks of gravel was laid for the purpose of ascertaining and testing the relative value of pit-run gravel and the gravel mix required by the contract, which re-
74 quired from seventy to eighty per cent of volume of hard cementitious gravel so graded as to range from three inches to one-half inch in diameter, and fine material or filler not to exceed thirty per cent by volume. (See page 26 of contract and specifications.) And it is not true that the result of said experiment showed that the pit-run gravel proved to be the best of the three experiments, as alleged in the complaint; and it is not true that said experiment was made at the request of the defendant but it was made at the request of the plaintiff near the beginning of the work, and this defendant is advised and believes that the contract and specifications should govern with reference to the performance of said contract, and that it is not subject to change for any reason whatever based upon the opinion or belief of the plaintiff that pit-run gravel could have been used in place of the gravel mix required by the contract, and defendant pleads the said contract as a full answer to the claim of the said plaintiff that representations were made that pit-run gravel would be acceptable, which is in plain opposition to the terms of the contract upon which this defendant relies. Said contract was made for the purpose of preventing a dispute, which the plaintiff is undertaking to create by the allegations of the complaint that a different kind of gravel should have been accepted than that gravel mix provided for by the contract. The defendant submits and alleges that all representations of every kind which were made on the part of either party at the time the contract was entered into are merged into and concluded by the contract itself, which was in writing and

signed by the parties hereto, and it forms the basis of the plaintiff's action. The said contract at page 26 reads as follows:

"The gravel excavated from the present streets, as herein before provided, may be used for the gravel base to be built, but it shall first be made to conform to the following requirements. It shall not contain material finer than such as will pass a screen with one quarter inch openings in excess of thirty (30%) per cent by volume of the contained gravel above this size, but the contractor when so ordered shall reduce the amount of fine material as much below this percentage as, in the opinion of the engineer, the character of the material being used may require. The contractor shall also, when necessary, add to the gravel excavated from the street, where same is being used to make a base for the new pavement, a sufficient amount of other gravel suitable for this purpose to make the resulting mixture when placed on the sub-grade and properly harrowed, as hereinafter
75 specified, contain from seventy (70%) per cent to eighty (80%) per cent, by volume of hard cementitious gravel so graded as to range from 3 inches to one half inch in diameter. The fine material, or filler, as above stated, shall not exceed thirty (30%) per cent, by volume, of the mixture and must be of a quality suitable for the purpose. It may be contained in the mixture as dumped or placed upon the sub-grade, or it may be added thereafter, if required."

Specifically answering that part of the complaint on page 9 wherein it is alleged that notwithstanding the contract permitted the plaintiff to use without treatment 14,000 cubic yards of gravel in the streets in said district for use in paving of such streets, and notwithstanding plaintiff's bid was made upon the express representation by the defendant that said gravel might be used without treatment, the engineer and the other defendants arbitrarily and wrongfully refused to allow the use of said gravel without screening the same, the defendant states that said gravel would have made a very defective base without being treated so as to conform to the gravel mix as specified, which the contract required should be seventy or eighty per cent gravel and the balance fine material, and it would have been insufficient to support the topping provided for in the completion of said paving, and it was expressly agreed under the contract with reference to the 14,000 cubic yards of gravel in the street that it could not be used without the same being made to conform to the gravel mix provided for on page 26 of said contract and specifications, except where designated in writing by the engineer as shown on page 39 of said contract and specifications, and on account of the defectiveness which would have resulted in said work if said gravel on the street had been used as it was taken up and without treatment, the said engineer of the defendant rightfully refused to allow the same to be used without said gravel being made to conform to said specifications with reference to the proportion of gravel and fine mixture required by the contract, and the said gravel on the street as well as the pit-run gravel which was procured from College Hill was required by said engineer to conform to said specifications of seventy or eighty per

cent gravel and the balance fine material, as required by the contract, and said plaintiff conformed and agreed to the same with reference to the said 14,000 cubic yards in the street which had been laid by a former improvement district, as well as the other gravel which
should be incorporated in the base for said pavement, and
76 after the said gravel was so laid the estimates for its work were
based upon the terms of the contract under items 27 and 28 of the contract, shown on pages 5 and 10, wherein it is provided that plaintiff should be paid twenty-two (22) cents per square yard for gravel under item 27 in laying a six inch base, and twenty-six (26) cents per square yard under item 28 in laying a seven inch base, and the plaintiff was paid for all gravel, including that which was already upon the street, which it used, and he accepted payment for the same under said items 27 and 28 of the contract, and plaintiff is now estopped from making a claim under a different provision of the contract, and the provision with reference to such payment for said 14,000 cubic yards being governed by the contract in the following language:

"Payment: Gravel base will be paid for by the square yard for the thickness of base specified or ordered and built in place complete, as above described. The price bid per square yard shall include all labor and materials above specified for this branch of the work, exclusive of the preparation of the sub-grade."

The said 14,000 cubic yards of gravel in the street were given to the said plaintiff and it was paid for removing the same from the street under item 2 of the contract, and it was likewise paid for every square yard of the same which went into the base at the rate of 22 cents per square yard for six inch base and 26 cents per square yard for seven inch base, except a certain part thereof which was defectively laid for which it was not entitled to receive payment, as it did not comply with the specifications. The gravel for which the plaintiff paid the defendant at the rate of eight cents per cubic yard was procured from gravel pits on College Hill, and said gravel when properly treated before being laid was of good and satisfactory quality, but it was not sufficient for gravel base when taken from the pit.

8.

The defendant denies that the engineer of said district required the gravel base to be laid in four courses, but said engineer did require the same to be laid in two courses under the terms and conditions of the contract under which said work was being carried on, which reads as follows, on page 39:

'Gravel base and pavement shall be laid in two courses, the thick-
ness of the bottom course, after being thoroughly compacted,
77 to be not less than three inches nor more than four inches, as
ordered by the Engineer. Each course shall be well harrowed, rolled and thoroughly compacted in the manner described under "Construction Of New Gravel Base—Items 27 and 28."

And on page 26 which reads as follows:

"Placing Gravel: The gravel mixture conforming to the requirements just above given shall be placed upon the prepared sub-grade in such a manner that the fine and course material shall not become separated. It shall then be spread by means of a blade grader or otherwise, as the Engineer may permit, to such a depth that after being well harrowed, rolled and thoroughly compacted the thickness of the gravel base shall everywhere be that ordered or specified, and the contour of the finished surface everywhere will be parallel to that of the finished pavement and at the proper distance below it."

"Harrowing: After the gravel mixture has been spread to a uniform depth over the sub-grade, as provided, it shall be thoroughly harrowed by means of a spike harrow suitably weighted for the purpose. The harrowing shall be continued until the fine and course material are thoroughly mixed and incorporated with one another, or as long as the engineer shall deem necessary. A small amount of loam or dry [pow-ered] clay shall be added, if necessary, by spreading same in a thin layer upon the gravel before the harrowing is completed. This added material is merely to fill the voids between the gravel pieces, if the fine material already present is found insufficient to do this."

"Rolling and Compacting: When the harrowing, as above specified, has been completed, the gravel shall be thoroughly rolled and solidified until it is consolidated, firm and approved by the Engineer, and has a uniform thickness everywhere of not less than that specified. The rolling shall be done with a ten ton steam roller, and shall commence at the sides and continue toward the center, after which the rolling shall be continued at 45 degrees to the length of the street from side to side across the gravel, or as the Engineer shall direct. Just before and during the rolling, if necessary, the gravel shall be thoroughly sprinkled with water."

"Any soft spots developing as the rolling proceeds shall be immediately dug out, and the opening thus made filled up with suitable material which shall be rolled and thoroughly compacted.
78 When completed, the gravel base must everywhere have the same solidity or stability, as the life and wearing qualities of the wearing surface to be placed upon it depend upon these qualities of the foundation."

"After the rolling has been completed, as just specified, the street shall be thrown open to traffice for a period of not less than two weeks, or as much longer as the engineer may deem necessary, before the wearing surface is placed upon same."

"Consolidation Test: The test to determine if the gravel base has been sufficiently consolidated shall be its ability to withstand the passage over it of a four (4) ton load of three inch tires so that the latter shall not make a wheel mark exceeding one-eighth inch in

depth, and no gravel base failing to meet this test will be accepted as a foundation for a wearing surface."

It is not true, as alleged in the complaint, that the engineer of said district arbitrarily and wrongfully, or in violation of the contract, required the plaintiff to treat or screen the gravel, but it is true that said engineer refused to approve the use of gravel in the base of said pavement which did not conform to the specifications of the contract of seventy or eighty percent of gravel and the balance fine material, according to the provisions of said contract, which have been hereinbefore copied in full, and if the gravel as it came from the earth had conformed with said specifications the engineer would have accepted and received the same, and would have permitted the same to have been used as a gravel base, but, as a matter of fact, said gravel as it came from the earth, or pit-run gravel as it is called in the complaint, did not near comply with the specifications of the contract. The proportions of gravel, clay and sand as it came from the earth frequently ranged from thirty to forty percent only of gravel, and in order to make a good base it was not only necessary that the said gravel mix should be uniform with reference to the proportions of gravel and fine material, but it should have been and was specifically specified to be seventy to eighty per cent, by volume, of hard cementitious gravel so graded as to range from three inches to one half inch in diameter, and the balance to be fine material or filler of a quality suitable for the purpose. If the engineer has permitted the plaintiff to use the gravel that was already upon the streets, having been paid there at a former time as a gravel pavement, or the pit-run gravel, the base for the pavement contemplated by the contract sued upon would have contained a non-uniform mixture in
which the gravel would not have exceeded thirty or forty per
79 cent, and the base would have been virtually a sand-clay base
of no substantial value as a supporting agent for the surface, and as to that part of the complaint which alleges that the plaintiff purchased gravel from the defendant which was procured from pits on College Hill, this defendant alleges that such gravel was sold to the plaintiff at eight cents per cubic yard, wagon measure at the pit, and said sale was made under that provision of the contract contained on page 40, which is as follows:

"It is agreed and understood that the Board of Improvement shall have the option of furnishing to the Contractor, gravel pit or pits, from which gravel to be used upon the work herein provided for may be taken. If the Board shall furnish such pit or pits containing gravel suitable for said work, the Contractor shall use gravel therefrom, and the Contractor shall pay to the Board Eight (.08) cents per cubic yard wagon measure at the pit for all gravel taken from any such pit or pits. No gravel from said pit or pits shall be used by the Contractor which does not meet the requirements for gravel set out in the specifications, and the furnishing of said pit or pits to the Contractor shall not in any wise be deemed or taken as a waiver or change in any of the terms of the specifications regarding the

character and quality of the gravel to be used upon the said work provided for herein."

The gravel which was obtained from said gravel pits did not conform to the specifications, and it was not represented to the plaintiff that the same would conform to the specifications, and plaintiff knew that it would not with reference to the proportion of gravel contained therein as it was taken out of the pit, and it was distinctly known to the plaintiff at the time it hauled said gravel that it did not so comply, and the allegations of the complaint are untrue that the defendant and its engineer, in violation of the terms of the contract and contrary to the spirit and letter thereof, continuously from the inception of the work until it closed down, insisted and required that the plaintiff should, on the gravel specifications, put in a base equal in effect to a concrete base for the asphalt, and it is not true that the plaintiff was required in effect to make a concrete base out of gravel material, but it is true that the defendant and the said engineer required and expected said plaintiff to lay such gravel mixture in the proportions required by the contract; such allegation is utterly unfounded since it is not only known to plaintiff and defendant, but a matter of common knowledge that the gravel base could not possibly have the compressive or tensile
80 strength of a concrete base, as the particles forming same are not bound or held together through the action of a cementing agent, such as Portland Cement, and it was not contemplated by the contract, or its performance, that the same results could be obtained, but it was necessary that the specifications be followed with reference to the proportions of gravel and fine material used in the base in order that the same might furnish an adequate and uniform support to the surface, and the failure to comply with said specifications would have resulted in a failure to get the results which are necessarily contemplated by the contract; and defendant only required of plaintiff such results as would and should have been secured by a substantial compliance with the contract requiring a certain kind of gravel mix to be laid in two courses in the manner and form specifically set out in the contract. The defendant alleges that not more than half of the gravel which plaintiff used from College Hill was bought from the defendant, and a good part of said gravel so purchased from defendant was never paid for now charged against the plaintiff, and the said plaintiff bought the other gravel which it used from other pits in the vicinity of College Hill.

9.

The defendant further answering herein states that it is required by the specifications, which are part of the contract for the construction of said pavement, that after the gravel base was laid that it should be opened to traffic for a certain time, but it is not true that the said gravel was washed away by reason of any requirement of the defendant, and if said gravel, or any part thereof did wash, it was one of the incidents of loss to which the plaintiff agreed when said

contract was made, and it is not true that plaintiff suffered injury or damage to the extent of $13,000.00, or any other sum, by the refusal of said defendant to allow pit-run gravel to be used, or by the requirements of the engineer and said board with reference to the manner of laying said gravel according to said plans and specifications.

10.

It is not true that the engineer of the defendant arbitrarily, wantonly and wrongfully delayed and stopped the plaintiff from laying asphalt from time to time without excuse, and if said engineer at any time contended that the surface of a certain street was too wet, then such was a fact, and the asphalt should not have been laid while said surface was too wet, and if said engineer contended at any other time, as alleged, that the surface was not sufficiently prepared,
81 then said surface was not sufficiently prepared, and said engineer did not object to laying asphalt at any time or place when the surface of the street had been properly prepared therefor; and it is not true that the said engineer failed or refused to advise the plaintiff where it might place and lay asphalt, and it is not true that said engineer did not lay out the work in advance so that it might be carried on in an orderly way; and it is not true that said engineer arbitrarily caused plaintiff to move its outfit from spot to spot on said streets and lay asphalt, as alleged in the complaint, or that by any arbitrary, wanton or unlawful action the laying of asphalt was delayed, or that said asphalt crew was disrupted from time to time, or that plaintiff sustained demurrage charges on material and tools, and expenses incident to stopping the work, and that the completion of the work in the district was delayed or that plaintiff was damaged in any sum whatever. The delays that plaintiff sustained were due to its incompetency and wilful and intentional negligence and its set and fixed purpose to violate the terms of said contract, or by not doing the work in the time and in the manner required by its terms.

11.

It is not true, as alleged in the complaint, that after the plaintiff was permitted by the board and members thereof to lay stone gutters in said district, and the work thereof was done by consent and with the knowledge of the board, and after said gutters were laid that the engineer of said district, with the consent of said board, arbitrarily, wantonly and without right overruled the action of the board in permitting plaintiff to lay said gutters, and it is not true that said engineer wrongfully and arbitrarily refused to give plaintiff an estimate of such work, and it is not true that said engineer continuously and from the inception of the close of said work, used an arbitrary, unreasonable and wrongful course with reference to the stone gutter and concrete curb and gutter by designating one block for a particular kind of gutter and curb, and then without right or reason wrongfully and arbitrarily waited until that block was completed without

designating another place at which plaintiff could put its crew until after the work laid out had been finished, or that plaintiff's crew would then have to await the further directions of the engineer, and it is not true that the engineer did not lay out such work in a connected manner, or that he would require the plaintiff to jump from block to block and street to street, or that plaintiff's outfit was
82 required to await the pleasure of said engineer in the matter of designating places to work, or that plaintiff was required to make expensive moves with its materials and crews, or that plaintiff was damaged thereby as alleged.

It is not true that the said engineer and the defendant caused plaintiff innumerable unnecessary and unreasonable delays; the said board and said engineer did not cause plaintiff to delay said work but insisted at all times that said work progress, and gave plaintiff innumerable notices to go on with the work and in every way possible consistent with the rights of the district, the defendant and said engineer favored said plaintiff with a view to inducing it to complete said work according to the contract, but said plaintiff in violation of its contract failed and refused to supply men and material, or an organization that was competent or capable of carrying out said work, and said plaintiff was constantly making excuses from time to time for its delays, and making new promises from time to time that the said work should go on and be completed, which promises were all broken, and instead of completing the work within one year, as required by the contract, the plaintiff completed less than one-half of the work although the time for its completion was extended twice for an additional period of one year each, and then the plaintiff wilfully abandoned the work, [intenting] thereby to violate the terms of said contract.

12.

The defendant denies that it is indebted to the plaintiff in the sum of $410.72, as alleged, for services rendered in the month of May, 1919, and denies that said amount was wrongfully and arbitrarily withheld on account of the costs of cleaning storm sewer inlets and grading parkings; the said amount was rightfully withheld and the plaintiff is not entitled to receive the same. The defendant further answering denies that the plaintiff is entitled to an estimate of $6,585.12 on account of work for November, 1919, and $219.91 for December work 1919. The November estimate would have been $4,481.62 and the December estimate $100.00 if plaintiff had complied with its contract, but plaintiff did not so comply and it violated and quit the same and was not entitled to receive said estimates or said pay for the same on account of the plaintiff being indebted to this defendant by such violations of said contract in failing and refusing to carry out or complete the same, and by reason of the counterclaim arising in favor of defendant, which is herein set out. And further it is provided by Section 25 on page 14 that "estimates may at any time be withheld or reduced, if, in the opinion of

the Board, the work is not proceeding in accordance with this
83 contract." Said work, in the opinion of said Board, was not proceeding in accordance with the provisions of said contract, and said estimates were accordingly withheld on that account and on account of the damages due the defendant for the violation of said contract.

13.

It is not true, as alleged in the complaint, that plaintiff *reason of being* unable to procure men and material in the prosecution of said work by reason of the war with Germany, but said plaintiff could have completed said work in the first year as required by the contract, and the plaintiff's allegation that is was delayed by said war and war enactments is inconsistent with another paragraph of the complaint stating that it could have completed said work but for some certain alleged faults on the part of the defendant in hindering and delaying said work, and it is not true that the war with Germany, or the war enactments were legal excuses for the plaintiff's setting aside or violating said contract, or refusing to complete said contract within said first year, nor are they a defense in the completion of said contract during the two periods of extension of one year each in which the defendant agreed that plaintiff should complete said contract. The defendants would have been bound to pay the amount stipulated in the contract for said work if the cost of material and labor had decreased during said period, and said war conditions to which reference has been made by the plaintiff cannot avail the plaintiff against the performance of the contract. Nevertheless, the defendant, in order to favor the plaintiff as much as possible, did not take advantage of the violation of the contract in failing to complete the same at the end of the first year, but voluntarily, though not legally required, extended the time for said completion.

It is not true, as alleged in the complaint, that plaintiff has been damaged by reason of the alleged breaches of the said contract in the sum of $115,250.84, or any other sum, and the defendant denies specifically each and every item, charge and allegation mentioned and described in the various bills attached to the complaint which are designated as Bill No. 1, Bill No. 2, Bill No. 2-A, Bill No. 3, Bill No. 4, Bill No. 5, Bill No. 6, Bill No. 7, Bill No. 8, Bill No. 9, Bill No. 10, Bill No. 11, Bill No. 12 and Bill No. 14.

Bill No. 1: More specifically answering Bill No. 1 and the allegations contained under that heading of the complaint, the defendant
says that Item 16 as carried forward in the contract made be-
84 tween plaintiff and defendant does not provide for 3,000 lineal feet of plain concrete curb 18 inches deep as alleged in the complaint, but said amount only appears in the proposal, and when it was carried into the contract the amount was reduced to 691 feet, more or less. Likewise, in Item 16-A there is not 2,500 [lineal] feet of plain concrete curb 15 inches deep in the contract, but said number only appears in the proposal, whereas that amount was reduced when the contract was awarded to 1,108 feet, more or less. Item No. 18 was not 4,112 lineal feet combined concrete curb and

gutter with 7 inch aprons as alleged, but said amount was only in the proposal and when the contract was made it was increased to 4,459 feet, more or less; and Item No. 19 was not 6,000 lineal feet combined concrete curb and gutter with 12 inch apron as alleged. but it appears only in the proposal and when the contract was signed it was reduced to 4,474 feet, more or less.

It is not true that Item No. 16 above mentioned was entirely cut out of the contract. The work has not gotten to the place where is is expected to use said concrete curb 18 inches deep, and it is not true that the remainder of plain concrete curb 15 inches deep has been cut out for the same reason given in the last instance, viz: that the work has not reached the point where said curb is required. It is true that the combined concrete curb and gutter with 7 inch apron has been cut out, but this defendant had the right to cut the same out under said contract. It is not true that all the balance of item No. 19 has been cut out, but it is expected that 755 feet more will be built in the completion of said work.

It is not true as alleged in said Bill No. 1 that the defendants have excluded from said contract 15,612 lineal feet of said Items 16, 16-A, 18 and 19. In the first place said figures are the aggregate of what plaintiff has alleged was embraced in all of said items on page 5 of the contract, and whereas plaintiff admits that 849 feet of said curb was put in. On the other hand, it is shown by the contract itself that when the contract was made the proposals shown on page 5, from which the plaintiff has erroneously quoted, was merged into the contract with reductions as hereinabove shown, leaving an aggregate of 10,712 feet of curb and guttering of the types therein mentioned, and nothing has been eliminated by the Board except Item No. 18, it having been found necessary to do so by said Board in order to make a good job, and the Board had the right so to eliminate the same under the provisions of the contract which are copied under paragraph 2, page 4½ et seq. of the answer. It is not true
85 that the plaintiff has sustained a loss of profit of $738.15, or any other sum, or that defendant is liable therefor.

It is not true that Item 20 on page 5 providing for 8,600 lineal feet of combined concrete curb and gutter with a 24 inch apron complete in place is the correct number of lineal feet of that kind shown in the contract, as the contract shows 3,627 feet of that kind of guttering and curbing, more or less, and it is not true that the defendant required the plaintiff to construct 17,522 lineal feet of that class of curbing and guttering, but plaintiff did [-*ob*struct] of that class 16,239 feet without objection, and if plaintiff made a mistake in the said bidding it was not the defendant's fault, for the proposal which is attached to the contract and specifications is a bid for the work, and under the instructions to the contractor attached to the contract on page 2 under Bids Must Be Balanced Bids as follows: "Bidders in their proposals will give the price for each separate item of the work, as well as a lump sum for the entire work as set forth in the proposal form provided, which lump sum must be equal to the summation of the various items;" it was expressly understood and agreed in said proposal or bids that the defendant was at liberty to accept or omit

any of the items set out therein when the contract should be finally let, or while the work was being carried out, which was the purpose of the balanced bid requirement, it having been supposed and believed all the way through that the bidder was making a fair and honest bid with a view to making only a proportionately equal profit on the various items of work; and under the said contract as pleaded and copied in paragraph 2, page 4-½ of this answer, the defendant had the right to add to or take from the number of feet under said item 20 which was to be placed in said work, and it is not true that plaintiff was damaged on account thereof in the sum of $1,338.80, or any other sum, or that the defendant is liable therefor.

As to the 3,000 cubic yards of gravel referred to in said Bill No. 1, one of the defendant's options as the work progressed was that the defendant might have caused the streets to be paved as they were at that time graded without narrowing them from fifty to thirty feet, and upon a part of said streets there was an old gravel pavement which had been placed there by a former Improvement District, and if said pavement had been placed upon the said streets as they were at the time the contract was let, and the width of fifty feet had been used in that form, it was expected that said existing gravel pavement would be used as a base for the other pavements or wearing
86 surface provided for in said contract, and in that event it would have been necessary to supplement the said existing gravel base with other gravel and the 3,000 cubic yards mentioned in Bill No. 1 might have been used in building up said gravel base and making it uniform, but the defendant did not exercise said privilege but on the contrary, shortly before the contract was signed the defendant decided to cut down the width of certain streets, which included that part of the district where the said old gravel pavement was, to thirty feet, which made it necessary to excavate and grade said streets and remove said gravel top, and the plaintiff and defendant agreed to the reduction of the width of the pavement on said streets and graded them down and removed the gravel that was thereon, which said gravel so removed was used by the said plaintiff, and plaintiff was paid for excavating said gravel and for the gravel itself when put back in the streets under Item 2, page 17, as to the grading, and Item 27, page 28 of the contract as to the gravel put back. The contract plainly authorized the defendant to eliminate said item of 3,000 cubic yards referred to in said Bill No. 1 under the provisions of said contract pleaded on page 4-½ of this answer, and it is not true that the plaintiff would have had a profit in said work of putting down said 3,000 cubic yards, and it is not true that the plaintiff was damaged in the sum of $1,500.00, or any other sum on account thereof.

With reference to Item 31 mentioned in said Bill No. 1, it is true that the proposal called for 67,239 square yards of two-inch asphaltic concrete wearing surface, but said amount was subject to change when the contract was let and the said yardage was not carried forward into said contract, but the amount agreed upon when said contract was let for said class of work was 100,000 square yards, more or less, of two-inch asphaltic concrete wearing surface (see page 10 of

the contract), and it is not true that the plaintiff was damaged in the sum of $13,400.00 on account of the breach of the contract by this defendant as alleged in the complaint.

As to Item 32 in said Bill No. 1, page 5 of the specifications, that is a proposal only, and does call for 33,436 yards of three-inch asphaltic-macadam (not asphaltic concrete wearing surface as alleged in the complaint), but when said proposal was merged into the contract said yardage was cut down to 10,000 yards. It is not true that the asphaltic-macadam has been entirely cut out by the defendant, but said defendant had and has the right to cut the same out
87 under said provision of the contract quoted on page 4-½ of this answer, and it is not true that by a change of the contract that the asphaltic concrete provided for in said contract has by this defendant been so modified as to take the place of said asphaltic-macadam, and thereby cut out said asphaltic-macadam, but it is true that this defendant decided at a meeting of the defendant Board on December 15, 1916, which was before the contract was actually signed, after having determined upon the width of the paving of said streets at thirty feet, to lay asphaltic concrete on the residential streets, and the defendant alleges that the provision for asphaltic concrete of 100,000 square yards, more or less, would have been sufficient for said residential streets without any change as to the yardage, and said decision was approved and requested by the plaintiff. In this connection the defendant alleges that the entire amount of yardage of pavement specified in the contract was about 137,000 square yards, whereas the actual area which the contract called for to be covered by paving was about 122,000 yards, and some part of the types of paving called for would have had to be reduced, or some of same might have been omitted in the completion of said work since the aggregate of the paving specified in the contract was in excess of this area, and said contract, was made with the view that this defendant might omit a part of said paving, and it necessarily had to reduce or omit some of the same, and the defendant had the right to substitute the same as it might see fit, as shown by the terms of said contract; and it is not true that the defendant ever made any change which was not subject to be changed back under said contract if it saw fit and that it was advisable or best to do so, and there was no consideration for any change in the types of pavement proposed to be laid if any change has been made, as alleged in the complaint, except where the pavement has actually been laid, and in that event only is the defendant bound or estopped from making changes as the work progressed, in order to accomplish the best result for the district. As the work progressed it was within the province and right of the defendant under the terms of the said contract to lay such type of pavement as the defendant deemed to the best interests of the district, and its right to do so was never questioned at any time by the plaintiff, and said plaintiff is estopped from making a claim on account of any alleged change; the plaintiff agreed to the manner of doing said work and to the kind of pavement that was being used as said work progressed; and if the work

had progressed harmoniously and plaintiff had gone on with
88 its contract, as it should have done, the defendant might have agreed to the laying of asphaltic concrete in excess of the 100,000 square yards, as said amount is qualified by the words "more or less," and might not have been asphaltic-macadam at all, because the said plaintiff had requested that said asphaltic-macadam should not be insisted upon in view of the fact that the laying of said asphaltic-macadam would have been more expensive to the plaintiff and it had not provided the materials or equipment for that kind of pavement. And as to the concrete, there would have been a considerable loss to the plaintiff in laying the same, and the question as to whether or not the defendant would waive or omit same, or require all of the same to be laid when plaintiff [*fot*] to that part of the district where the traffic was heavier and where it was originally contemplated that said concrete might be used, was never determined, though the defendant might have agreed upon a change as to the amount of said concrete, or might have agreed that the same should have been entirely excluded and asphaltic concrete substituted, but no contract was actually made between the plaintiff and defendant to omit said concrete. It was the policy of the defendant in this case to do everything possible to facilitate and complete the work of paving in said district, and wherever it was practicable and not detrimental to the interest of the district to favor the plaintiff, the defendant did so, and if said concrete had been omitted when the work had progressed to that locality the plaintiff would have been saved considerable expense by the substitution of asphaltic concrete, and plaintiff would not have been damaged by the omission of concrete pavement and defendant denies that plaintiff has been damaged by any act of the defendant with reference to a change in said concrete work as alleged, but this defendant pleads that it had the right to omit said concrete at any time it saw fit under the terms of said contract, without being liable or chargeable with any loss or damage arising under said omission.

As to Item 33 the proposal shows 6,125 square yards, as alleged in the complaint, of said concrete work, but the contract itself shows 6,000 yards, and it is not true that the plaintiff has been damaged in the sum of $1,225.00 or any other sums on account of the alleged cutting out of said concrete because the same has not been done, and as the plaintiff has violated the contract and abandoned the work, the defendant of necessity will demand that said concrete be laid as specified under the contract, and also 2,000 yards of said asphaltic-
macadam, also all brick pavement, in order to complete the
89 area of the district, by using the class of pavement specified in the contract. As to Item 34, it is true that as to the 7,000 yards of gravel pavement, it was agreed between the plaintiff and defendant when that part of the district was reached for said gravel that it should be omitted, and that asphaltic concrete should take its place, and accordingly that class of pavement was substituted for said 7,000 yards of gravel pavement by the consent of the plaintiff. The defendant had the right to omit said gravel without the consent of the plaintiff under that part of the contract which is copied in

paragraph 2, page 4½ of this answer, but plaintiff expressly agreed thereto, and is estopped from claiming damages on account thereof. In addition to the foregoing the defendant shows to the court that there is no provision in the ordinance creating the district for the use of gravel pavement, which was well known to the plaintiff, and by the terms of which also it was bound.

Bill No. 2. With reference to Bill No. 2, specific answer has already been made as to the November and December, 1919, work, and as to the item of $878.24, it is not true that there was an error of the defendant in estimating the gravel base, but it is true that considerable of said gravel base in excess of the said amount was rejected on account of being defectively constructed, and as to the item of $195.00, the plaintiff is not entitled to recover the same for the same reasons which have hereinbefore been pleaded in full as applied to the other claims of the plaintiff.

Bill No. 2-A. As to Bill No. 2-A the defendant denies each and every allegation and item therein set forth, and denies that said defendant is indebted to the plaintiff on account thereof in any sum whatever.

Bill No. 3. It is not true that the defendant wrongfully took over and converted to its own use any of the materials mentioned under this head, or that said defendant is indebted to the plaintiff in the sum of $1,374.50 on account thereof, but if any of said items were left here by the plaintiff the same are subject to the plaintiff's order.

Bills Nos. 4 to 11. The defendant denies that it took over or converted to its own use any of the property described in Bills Nos. 4, 5, 6, 7, 8, 9, 10 and 11, and all of said property described in said bills that was left in Texarkana is subject to the order of the said plaintiff, and the defendant is making no claim to the possession of any of said property and it is subject to removal by the plaintiff at any time it may see fit.

90 Bill No. 12. The defendant denies that by reason of the violation of said contract that the plaintiff was compelled and required, in violation of said contract, to expend the sum of $15,275.00 in labor and material as shown in Bill No. 12, and the defendant denies each and every allegation set out in said Bill. The defendant denies that plaintiff was damaged by reason of extra thickness of asphalt caused by Engineer compelling extra sweeping from the top of the base after same had been brought to grade. If said plaintiff laid asphalt of extra thickness it is due to its own fault and not to any act of this defendant. It is not true that the engineer rejected any curbing and guttering except such as was defective, or that the defendant is liable for taking up or replacing guttering on account of any neglect or fault of the Engineer, and it is not true that the plaintiff lost time of curbing crews waiting on grade, and it is not true that plaintiff was put to extra cost for unnecessary moves of asphalt force from one place to another, or extra cost for loss of time of men at asphalt plant or on street, or that said men were

stopped by the Engineer, or that they waited for the engineer designate where they should lay asphalt.

14.

It is not true as alleged in the complaint that plaintiff perform its part of said contract, and it is not true that the defendant wilful wantonly and arbitrarily breached the contract in the several m ters and things set out in the complaint. It is true that after t second extention of said contract had expired in November, 1919, th defendant would have been willing to renew and extend said co tract for another year upon the terms and conditions of the form extension thereof, but the plaintiff refused to renew said contr without requiring conditions to which the defendant would not agr and the said plaintiff refused to renew the contract and proceed wi the work, and this defendant was unwilling for said contract to considered or treated as renewed or in force and effect without mutual agreement in writing to that effect in which the terms such extension should be expressed and limited. It is not true th the defendant took over the work for the purpose of completing t same itself, but it is true that after the plaintiff refused to renew sa contract and proceed with said work, and after the defendant h given the ten days' notice required by said contract the said defen ant took possession of said unfinished work and called upon the su

ties upon the bond of the Burke Construction Company

91 take over and carry out said contract according to its term and thereafter the said Burke Construction Company on t 16th day of February, 1920, filed this suit, and after said suit w filed on or about March 1, 1920, the United States Fidelity & Gua anty Company of Baltimore, Maryland, one of the sureties on t plaintiff's bond, wrote a letter to the defendant refusing to comp with the defendant's demand that it take over and complete sa work.

The defendant denies that it ever proceeded with or undertoo to carry out said work under Section 16 of the plans and specifi tions; and the only object and effect of what the defendant did i pursuance of giving said notice and taking possession of said wo under said Section 16 was to terminate the contract which had alread been abandoned and violated by the said Burke Construction Co pany, insofar as submitting to the Burke Construction Compan having the privilege or opportunity of further obstructing or dela ing the said work under such plan or procedure as this defendan might determine upon and formulate for the completion of th work through the plaintiff's sureties on the bond, or by letting th contract to some one else, and under said contract, in pursuan of the action taken by the Board in notifying said Burke Constru tion Company to go ahead with the work, or else quit the jub en tirely, the defendant had the right under said Section 16 to take ov such equipment as said Burke Construction Company had left he and the said Burke Construction Company would have had no rig

to remove the same even though it had not been taken over and inventoried by the defendant under that part of the contract and specifications not only of Section 16, but of Section 24, page 13, which is as follows:—

"Under this contract it is understood and agreed that at no time, prior to the final acceptance by the party of the first part of the work to be done, will the Contractor remove or ship from the City of Texarkana, Arkansas, any tools, equipment or machinery used by him in the performance of the work, without consent in writing to do so from the Board."

The defendant denies that the defendant illegally and wrongfully took over, and converted to its own use the asphalt plant, rollers and other machinery and equipment which had been in use in said work, but said defendant did take over said property as it had a right to do under said contract according to the quoted terms of the foregoing provision of said contract, but there was no pur-
92 pose, intention or design on the part of this defendant to convert said property to the use of said defendant, and it was after the defendant had taken possession of said property that it notified the said Surety Company to complete the work, intending and expecting that the Surety Company would avail itself of its right and obligation to complete said work and to use said equipment in such work.

It is not true that said asphalt plant, rollers and other machinery is of the reasonable value of $18,115.00, or that it has a rental value of $2,000.00 per month, or any other sum, but that said machinery, tools and equipment are antiquated, inefficient, greatly worn and of very little practical value, and the said work could not be completed economically with the use of the same.

The defendant alleges that the plaintiff in the month of September, 1919, tore up Hazel Street from Sixth Street to Broad Street, four blocks, which was one of the main arteries of public travel of the city, and promised when the excavations were made to follow the same up with curb, gutter and gravel base so that the same would become passable, but failed and refused to do so after said excavations were made and left the same in a condition dangerous to life and property on account of gulleys and ditches. In the latter part of December, 1919, a written notice was given the plaintiff to repair said streets which was disregarded, and the said defendant found it necessary to fill up the gulleys and ditches upon said Hazel Street between Sixth Street and Broad Street, which it had the right to do without being subject to the responsibility or liability of undertaking to complete the contract entirely under the 3rd paragraph of section 20, page 13, of the contract, which is as follows:

"Whenever, in the opinion of the Engineer, it is necessary that certain portions of the work be done immediately, the Contractor shall proceed with such work without delay. On his failure to do so, after either verbal or writ-en order by the Engineer, the Board

shall have the power to proceed with such work forthwith, by day labor or otherwise, and deduct the cost of the work from any money due, or which may become due the contractor."

The defendant, The Board of Improvement, further answering herein, says that the contract sued upon in this case by the plaintiff provides that the plaintiff, The Burke Construction Company, shall do and perform all of the work and furnish all of the labor, materials,
tools and equipment necessary to construct the paving im-
93 provement to be put in in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, a copy of which contract is in possession of the plaintiff, and the original of which will be introduced in evidence by the defendant at the trial of this cause.

Defendant states that the plaintiff was allowed by the terms of said contract one year from November 29th, 1916, in which to complete the said paving improvements, that time was and is made of the essence of said contract by Section 15 thereof; defendant says that plaintiff violated said contract by its failure and refusal to furnish the necessary labor, materials, tools and equipment for said work, and failed to complete but a small proportion of said work within said time, which failure to complete the work was due entirely to its own fault and neglect. That upon request of plaintiff, and as an inducement to have plaintiff complete the said work, the time for completion thereof was by this defendant extended to November 1, 1918, by written agreement dated the 19th day of February, A. D. 1918; that by said extension agreement of said time it was expressly agreed that all of the original contract and its terms, conditions and provisions were retained, re-agreed to and reaffirmed as being in full force and effect during the period of said extension, and it was further agreed in said extension agreement that Section 15 of said original contract should become effective immediately upon the expiration of the time limit in said extension agreement provided, and that time was thereby made of the essence of said first extension agreement.

Defendant says that plaintiff violated said contract as extended by its failure and refusal to furnish the materials, labor and equipment necessary to finish the said contract within the time specified, and failed to complete but a small proportion of said work within the said extended time, all of which was due entirely to the fault and negligence of the said plaintiff.

Upon the further request of the plaintiff, and in order to induce the plaintiff to complete its said contract, this defendant granted to the plaintiff further time until November 1, 1919, to complete said paving improvements, the said second extension agreement being dated January 7, 1919, and being signed by both parties. It was expressly by said second extension agreement provided that the said original contract and the first extension thereof with all of their terms and provisions, except where charged by the said second extension agreement, were to continue in full force and effect, and the said original agreement and the first extension agreement were by said second extension agreement re-agreed to, re-affirmed and retained,

and it was in said second agreement affirmed that time was of
94 the essence of said extension. Copies of said two extension agreements marked respectively Exhibit "A" and Exhibit "B" are hereto attached and made a part of this answer. Likewise the sureties upon the bond of the plaintiff agreed in writing to the said extensions whereby the rights of all parties to said contract and extensions were duly preserved, as will be seen by reference to said extension agreements.

Defendant alleges that if there were any errors, omissions or wrongful or arbitrary action on the part of the engineer of the defendant, or of the defendant itself, or if there were any changes, alterations or additions to said original contract upon the defendant's part, as alleged in the complaint, that the said errors or omissions, or wrongful or arbitrary action of said engineer, or any charges, alterations or additions, were agreed to and waived by said extension agreements. The plaintiff well knew the interpretation which said engineer and this defendant had placed upon each and every clause and condition of said contract with reference to all the matters and things about which plaintiff complains when said renewals and extensions of the contract were agreed upon as hereinbefore set out, and particularly those matters of which plaintiff complains relating to the screening of gravel or method required for laying gravel base, or use and treatment of the gravel which was upon the streets at the time the contract was made, and the gravel which was obtained from the pits known as pit-run gravel, and the requirements with reference to preparation for asphalt paving and the conditions required before the same was laid, and the sweeping of the gravel base before laying said asphalt, and the designation of places to work, and all requirements with reference to curb and gutters and the thickness of the asphalt pavement, and the omissions and additions of certain units of work and all changes mentioned in the complaint, and plaintiff agreed to such interpretations and construction which said engineer and this defendant insisted upon, and is estopped by said extension contracts from claiming a different interpretation and construction or method of doing work, and from claiming damages arising therefrom. The defendant here pleads the said two extension agreements as waivers of any breach of said original contract, and here set- up and *rely* on said original contract and said two extension agreements and claim- the benefits thereof as a full defense against all claims made by the plaintiff.

While setting up and relying on said extension agreements as
95 waivers upon the part of the plaintiff, the defendant states that it has no knowledge of any errors committed, or wrongful or arbitrary action or conduct of the engineer, or defendants, and the defendant has no information or knowledge of any omission, alteration, change or addition not authorized by said original contract, but avers that the said original contract and all extensions and all alterations thereof, as shown by said extension agreement, have been carried out and performed by defendant in accordance with the terms and conditions of the same.

Defendant states that the plaintiff was allowed a period of three

years by the original agreement and the said two extension agre ments in which to put in and complete the said street improvement although plaintiff had agreed to complete the same in one year. Th said plaintiff violated said contract and the extensions thereof b failing to complete said work, or to furnish labor, materials an equipment for that purpose, and such failure was due entirely to th negligence of the plaintiff, notwithstanding the defendant had e deavored to favor the plaintiff as much as possible with reference t the manner of doing the work and with reference to extensions o time, and at the end of said time of the second extension the plai tiff had hardly completed one-half of said work, which the defend ant here pleads as a violation of the contract and a defense agains any claim whatever arising under said contract. Although the tim for completing said work had expired and the Burke Constructio Company had violated said contract and had no right to a furthe extension, the defendant offered to grant a further extension of tim from November 1, 1919, to November 1, 1920, as an inducement t get the plaintiff to carry out said contract, which said offer was mad upon the basis of a letter which the Burke Construction Compan wrote to said board requesting an extension of the time to Decembe 1, 1920, the request having been fully granted with the exceptio alone of an additional month which the Burke Construction Com pany asked for. No reply was made to the proposition of the boar and it was not accepted by the Burke Construction Company, an said defendant was not and is not bound by the said proposition as i was not accepted. Moreover, an extension agreement was prepare by the attorney for this defendant dated on or about December 1 1919, having for its object the extension of the time for the comple tion of said work to November 1, 1920, and the same was forwarde to the Burke Construction Company, but the said Burke Constru tion Company refused to reply to the same; but thereafter a letter wa addressed to and received by the board dated December 12, 1919, de manding that the defendant discharge the engineer, E. F.
96 Peterson, as a condition for the carrying on of the work, and the defendant declined said proposition on the ground tha the plaintiff not only had no right to make such demand, but tha said demand was actuated by a desire to get rid of the engineer, who had done nothing to justify dismissal and who had merely followed out the requirements of the contract and performed his duty as en gineer. Thus the contract was broken by the plaintiff and the same was never further renewed or extended beyond November 1, 1919, the day for the completion of said work. The request for the dismissal of the engineer December 12, 1919, was an afterthought on the part of the plaintiff for the creation of a reason or excuse for [quit -ing] the work and abandoning the same, and thereupon the said request having been refused, there was other correspondence between the plaintiff and defendant in which no extension agr ment was reached.

By failing to finish the said work within the time prescribed plaintiff violated said contract and it is not entitled to claim or demand any damages as sued for herein; but, on the other hand, the plain-

tiff is liable by reason of said breach to this defendant for its failure to comply with its said obligations in a sufficient amount to make good the difference between the contract price for completing said work and the expense which will be required to complete the same.

Defendant says that on or about the 1st day of December, 1919, plaintiff quit and abandoned the said work entirely, and discharged its employees and removed its teams from the city of Texarkana, Arkansas, and shipped away asphalt and other paving materials, having in view the purpose to abandon said work and leave the same in its unfinished condition. The defendant alleges that in Section 16 of the Specifications of the plaintiff's said contract it is provided:

"Section 16: In case of any unnecessary or inexcusable delay in the general conduct of the work, or in the event of an actual or practicable abandonment of the work the Engineer will notify the Contractor and his bondsmen to that effect. If the Contractor or his bondsmen (and if the latter shall proceed with the work they shall assume all the obligations and be subject to all the restrictions herein imposed upon the contractor), shall not within ten consecutive days thereafter take such measure as will in the judgment of the Board, insure the satisfactory completion of the work in the time specified, or in any reasonable time thereafter, if he has been permitted to continue beyond the time specified in this contract, the engineer
97 may then, by and with the consent of the board, notify the aforesaid contractor and his bondsmen to discontinue all work under this contract, and it is hereby agreed that the Contractor and his bondsmen shall immediately respect said notice and stop work, and cease to have any right to possession of the ground, and the contractor shall not be entitled to claim or receive any damage for not being allowed to proceed".

Accordingly the defendant, finding that said work had been so abandoned, or that there was an inexcusable delay in the general conduct of the work, caused the engineer of said district to notify the contractor and his bondsmen to that effect, and that if said contractor and bondsmen should not within ten consecutive days take such measures as would in the judgment of the Board insure the satisfactory completion of the work, that the said contractor and his bondsmen should discontinue all work under the contract, and that said contractor and bondsmen should cease to have any right to possession of the work and ground; and that thereafter the said bondsmen and contractor having failed to resume work, the defendant took possession of said grounds and called upon the sureties upon the bond to take over the work and they failed to do so, as hereinbefore shown.

Defendant further alleges with reference to the charges in the complaint that the Engineer acted wantonly, arbitrarily and illegally in requiring the plaintiff to do the work of curbing, guttering, screening gravel, laying gravel base and asphalt and the other work which forms the basis of plaintiff's complaint, that no action of said Engineer was wonton, wilful, or arbitrary, and that on the other hand under the contract and specifications the said Engineer had

the right to designate how said work should be done, and to interpret the said contract and specifications and his direction and interpretation was final, and defendant here pleads as against said allegations all of the provisions of said contract relating to the authority and power of said Engineer, particularly Sections 1, 2 and 4 on page 8; 5, 9 and 10 on page 9; 12, 13, 15 and 16 on page 11; 17, and 19 on page 12; 20 on page 13 and 25, 26, 27 on page 14; and defendant further pleads those provisions of the contract giving the authority to Engineer under the various subjects of said contract. Said sections of said contract show that all the work shall be done under the supervision and control and to the entire satisfaction of the engineer, and all explanation or directions necessary for the proper execution and construction of the work shall be given
98 by him, and the contractor agreed to accept as final all the decisions of the engineer as to the fitness of the materials furnished, quantity or quality of work done and to complete said work to the satisfaction of said engineer in all respects; and said engineer has the right to determine all questions in dispute that should arise in the execution of said work.

The defendant further pleads those sections of the contract which give the Board of Improvement authority to determine all questions which might arise with reference to the performance of said contract, and pleads paragraph 3 on page 40:

"The Board of Improvement shall be the final authority for the settlement of any and all differences arising under this contract between agents and employees of the board and the contractor. The board shall have the authority to determine all doubtful questions and to interpret the contract and specifications, and the determination and interpretation of the board shall be final and conclusive. The work specified under this contract shall be carried on and completed to the satisfaction of the engineer, and also to the satisfaction of the board."

The defendant further pleads each and every provision of said contract and specifications as a defense in this action against the claim of the plaintiff.

16.

The defendant, The Board of Improvement, further answering herein, states that Paving Improvement District No. 20 of the City of Texarkana, Arkansas, is a special assessment district organized in the City of Texarkana, Arkansas, under the laws of the State of Arkansas providing for the creation of improvement districts in cities and towns; that the said Paving Improvement District No. 20 is subject to only such liabilities as are expressly provided by said acts of the Legislature, and that said Paving Improvement District No. 20 is endowed only with such authority as is prescribed by such laws. Defendant states that under the said laws and under its organization as such special assessment district, it is not liable for damages of any nature; that it has no authority nor power to

levy and collect assessments against the property in the said district to pay damages. Defendant further says that the purpose for which said district was organized and for which assessments of benefits have been levied and are being collected from the property in said Paving Improvement District No. 20 is to construct and build pavements and improvements upon the streets within
99 said Paving Improvement District No. 20, and that the rights of this Board and of the said Paving Improvement District No. 20 extend no further as to collections of assessments and levying the same against the property in this district than to collect and levy assessments for said pavement and improvements upon said streets.

Defendant further says that said Paving Improvement District No. 20 has no property out of which a judgment for damages can be satisfied, and that the said district has no right to levy assessments for the satisfaction of a judgment for damages. The defendant further says that a large part of the improvements to be put in in said District No. 20 have not yet been completed, and that the property owners whose property has not yet been improved are paying assessments of benefits for the said improvements and that if the said assessments are taken away from this Board by a judgment for damages against this Board, then the said property owners whose property has not been improved will have paid their assessments without receiving any benefit whatever, and that the said funds will thereby be diverted and misappropriated from the purpose for which they were collected. Defendant further says that it has no means of making any assessment against the property in said Paving Improvement District No. 20 other than that made by the original assessment of benefits, except that the said original assessment may be readjusted annually and in accordance with additional improvements placed on the lands, but only for such purpose; that it is not contemplated by the improvement district laws of the State of Arkansas that an improvement district, after levying an assessment against property for an improvement, may set aside the said original assessment and levy an entirely new assessment; that the levy of such an entire new assessment is contrary to the said improvement district laws, and that Paving Improvement District No. 20 of the City of Texarkana has already levied an assessment against the property of said district amounting to 20 per cent of the assessed value of said property, the legal limit, and that such original assessment cannot now be set aside and an entirely new and additional assessment levied. Defendant further says that the said assessment originally levied, and which is now being collected by said Paving Improvement District No. 20 through this defendant as its Board of Improvement, is insufficient to pay for the putting in of the Improvements for which said district was organized and also to pay the claims for damages made by the plaintiff: that it will take
100 all of the funds now in the hands of this Board and additional funds to complete said Paving Improvements in said district, and that no amount will or can be left in the hands of the defendant for the payment of the plaintiff's said claims for damages.

Counterclaim.

The defendant, the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, for its Counterclaim against the plaintiff, the Burke Construction Company, alleges and states:

The defendant here pleads all of the breaches of said plaintiff's contract as set out in this defendant's answer hereinabove set forth, and re-affirms and sets forth in this its counterclaim, all of the said breaches and here adopts said Answer as a part of this counterclaim and refers to said answer for said specific allegations of said breaches.

Defendant shows that in addition to the original contract entered into between the plaintiff and this defendant, on the 29th day of November, A. D. 1916, and in addition to the two extension agreements set out in this defendant's Answer and filed therewith as Exhibits "A" and "B," which said original contract and said two extension agreements are here referred to and made a part of this counterclaim, and are relied upon by this defendant herein, a further memorandum agreement was entered into between the plaintiff and defendant dated the 12th day of April, A. D. 1919, respecting a modified form of stone and concrete curb and gutter, by which memorandum agreement it was provided that a modified stone gutter should be laid in accordance with the specifications for Item 25 in said original contract, and at the price specified for said Item plus seven cents per lineal foot, and in which memorandum agreement it was further specified that a modified form of concrete curb and gutter should be laid under the specifications provided for Item 21 in said original contract, to be paid for at the same price as said Item 21. A copy of said memorandum agreement is hereto attached, marked Exhibit "C" and made a part of this counterclaim.

Defendant here re-avers and re-asserts that the said original contract, and the extensions thereof, and the said memorandum agreement of April 12, 1919, have in all things been lived up to, carried out and performed by this defendant, in accordance with the terms and conditions thereof, but that the plaintiff has not performed and carried out its obligation under said agreement, but has violated and breached the same as is in defendant's answer set forth.

101 Defendant states that by reason of the breaches of said contracts upon the part of the plaintiff, the defendant has been damaged, as follows:

A large amount of work to be done in said Paving District, under plaintiff's said contract, approximately one-half thereof, yet remains uncompleted by the plaintiff, and the specific amount of each class and kind of work yet to be done and the amount it will cost this defendant to put the same in, over and above the prices at which the plaintiff had agreed to do said work, are as follows:

15,966 cubic yards grading	$11,655.28
1,313 lineal feet plain concrete curb 18 inches deep	249.47
573 lineal feet plain concrete 15 inches deep	183.36
2,421 lineal feet concrete marginal curb	435.78
411 lineal feet combined concrete curb and gutter 12 inch apron	131.52
1,265 lineal feet combined concrete curb and gutter 24 inches apron	607.20
4,711 square yards concrete gutter	706.65
5,024 square yards 4 inch concrete base	5,576.64
7,807 lineal feet stone curb reset	624.64
302 lineal feet curb protectors	75.30
738 square yards relaid stone gutter	959.40
651 square yards relaid brick gutter	403.62
26,171 square yards new gravel base 6 inches thick	$11,253.53
8,342 square yards new gravel base 7 inches thick	3,837.32
3,900 square yards 2½ inch [vertic*la*] fibre brick wearing surface	6,162.00
10,456 square yards 3 inch vertical fibre brick wearing surface	15,474.88
35,030 square yards 2 inch asphaltic concrete wearing surface	18,916.20
102 1,974 square yards 3 inch asphaltic macadam wearing surface	1,441.02
6,000 square yards concrete pavement	7,920.00
7,540 lineal feet Oak Headers	2,337.40
Total	$88,951.31

Defendant says that it has been damaged by the plaintiff by reason of plaintiff's breaches of said contract, in its failure and refusal to complete the said above mentioned work, in the said total sum of Eighty-Eight Thousand Nine Hundred Fifty-one 31/100 Dollars.

This defendant further shows that it has in its hands and possession, the sum of $13,732.45 of funds representing retained percentages upon estimates of work done by the plaintiff in this District under its contract. Said contract provides that 15% of all estimates should be retained by the defendant until all of the work in the District to be done under said contract was entirely completed in accordance with the terms and conditions of the specifications. Defendant also shows that payment for certain work done by the plaintiff after its time for completion had expired, amounting to the sum of approximately $4,500, has been withheld by this defendant, because when said work was done by the plaintiff its contract had already expired, and this defendant had no authority to pay therefor, and further because under the terms of the specifications the defendant had and has the right to withhold payment of estimates if the work in the District was not progressing satisfactorily, which said satisfactory progress was not then, and has not since said time been made. Defendant further shows that the plaintiff is a non-resident of the State of Arkansas, and that said plaintiff is not possessed of

sufficient property and assets to meet its debts and obligations, and that said plaintiff is insolvent; that because of the non-residency and insolvency of the plaintiff, the defendant has the right to counterclaim and set-off the said amounts of retained percentages and the amount withheld on work done after the contract time, against any claim of the plaintiff, and defendant here pleads that it be permitted to set-off and counterclaim said sums against the plaintiff. Defendant further shows that by reason of the provisions and terms of plaintiff's said contract regarding the retention of said percentages and regarding the withholding of said sum for work done after con-
103 tract time, this defendant has an equity in said retained percentages and in the amount so withheld, and in equity and good conscience the defendant ought not to be required to pay the said retentions and the said amount withheld, to plaintiff, but ought to be permitted to hold the same and apply said amounts upon the work yet to be done under the said contract and to any damages which the defendant has sustained by reason of plaintiff's said breaches of said contract. And defendant asks that its claim for damages as herein set out, be offset against said funds now in the hands of this defendant, and also be offset against any and all claims of the plaintiff.

Defendant further shows to the Court, that this suit is, properly, a suit of equitable cognizance; that numerous and complex and complicated accounts and statements are involved; that the defendant claims that more had been paid to the plaintiff than is due it, as is hereafter shown, while the plaintiff is claiming a balance due to it of $114,000 arising from various contentions of plaintiff regarding sweeping of gravel base, laying extra thickness of asphalt, rejection of curb and gutter and the amount and value thereof, loss of time of curbing crews, extra costs for unnecessary moves of asphalt forces, loss of time of men and teams, stopping of asphalt plant, claim of balance due on concrete curb and gutter, alleged profits on asphalt wearing surface, and asphalt-macadam, and concrete and gravel pavement, claim of balance on November and December, 1919, work; claims of material bills, and the value of certain tools, machinery and asphalt plant equipment. Defendant states that there is a conflict between the plaintiff and the defendant with reference to the kind and character of work, and as to the materials to be used, which the contract calls for, which involves the taking of much testimony and the statement of accounts upon the theory of each party upon practically every subject of said contract, including the kind and character and quality of curbing, guttering, and gravel, and the expense of preparing the gravel for use, and there will also be much accounting required with reference to the amount which defendant is entitled to recover herein.

Defendant states that Section 33 of said contract provides that plaintiff shall keep the improvements to be put in under said contract, in good repair, for a period of five years from and after the completion and acceptance of all of the work to be done thereunder. That Section 26 of said contract provides that said contract shall not

be considered as having been completed until the plaintiff
104 shall have filed with this defendant, a proper maintenance bond acceptable to the defendant as provided for in Section 33, in the penal sum of $25,000. Defendant further shows that by Addenda to said contract, the defendant reserves the right to waive the requirements of said Section 33 regarding maintenance, and it is further provided by said Addenda that if said maintenance is waived, the following deductions shall be made from the unit contract prices for the work to be done, to-wit:

2½ inch vertical fibre brick, 2¢ per square yard;
3 inch vertical fibre brick, 2¢ per square yard;
2 inch asphaltic concrete, 6¢ per square yard;
3 inch asphaltic-macadam, 10¢ per square yard;
Concrete pavement, 15¢ per square yard.

Defendant states that by reason of plaintiff's failure and refusal to complete its said contract, and the breaches of said contract on said plaintiff's part in failing to complete the same in contract time, and by its abandonment of said work, the plaintiff has renounced its said obligation to keep the said paving improvements in repair and for said period of five years, and has renounced its obligation to give the said maintenance bond of $25,000 required by the terms of said contract, which constitutes and is another and additional breach of plaintiff's contract upon the part of the plaintiff; and by plaintiff's said breach in failing to furnish said maintenance and said bond, the plaintiff has been overpaid on the asphaltic concrete wearing surface put in in this District in the amount of $3,441.36—the plaintiff having been allowed and paid the sum of $47,031.92 for the laying of 57,356 square yards of said asphaltic concrete at 82 cents per square yard, when the proper amount less maintenance should be 57,356 square yards at 76 cents per square yard, or $43,590.56, or a difference of $3,441.36 in defendant's favor, and in which sum the defendant has been damaged by plaintiff's said breach.

Defendant further shows that because of plaintiff's failure and refusal to complete its said contract, and its failure and refusal to furnish the said maintenance and maintenance bond, the defendant has no alternative except to elect to waive the said maintenance, and defendant is forced to so elect, and defendant now so elects and waives such maintenance, as it has a right to do; and defendant says that

by reason of said failure and refusal to furnish said mainte-
105 nance and said maintenance bond and by reason of defendant being required to waive said maintenance, the contract unit prices for the work done and to be done are controlled and specified and refused by said Addenda regarding the waiver of maintenance, in the amount on each square yard of pavement done and to be done, as hereinabove set out. And defendant states, that the unit prices as specified and reduced by the said Addenda regarding maintenance, are the proper unit prices upon which to figure the cost of the work already done under said plaintiff's contract, and that said reduced unit prices should be taken and used as the basis upon which to compute the damages suffered by this defendant for work

uncompleted by said plaintiff and yet to be put in by this defendant.

Defendant further shows that the terms of plaintiff's said contract provided that all of the work done and to be done under said contract by the plaintiff shall conform to the specifications for said work, and shall be put in, constructed and completed to the satisfaction of the Engineer and of this defendant, and that all of said work so put in should be put in in a good substantial and workmanlike manner, of good and suitable materials. Defendant shows that the following items of work, and the following quantities of same, put in by said plaintiff, were and are not put in in accordance with plaintiff's said contract, nor were they put in in a good substantial and workmanlike manner, nor to the satisfaction of the Engineer of this District, nor to the satisfaction of the defendant, but that said work so done by the plaintiff has been rejected by the Engineer and by this defendant, and is inferior, shoddy, unworkmanlike and defective, to-wit:

	Contract price.
Item 21. Concrete Gutter, 463 sq. ft.....	$69.45
Item 25. Relaid Stone Gutter, 700 sq. yds.....	259.00
Item 26. Brick Gutter, 90 sq. yds.....	31.50
Item 27. New 6" Gravel Base, 6,577 sq. yds.....	2,152.92
Item 28. New 7" Gravel Base, 1,940 sq. yds.....	504.40
Item 31. 2" Asphaltic Concrete 2,020 sq. yds.....	1,535.20

An itemized statement showing the location of said defective and rejected work is hereto attached and marked Exhibit "D."

106 Defendant states that it will require the sum of Seven Thousand One Hundred five 67/100 ($7,105.67) dollars to replace and repair the said defective and rejected work, and that this defendant has been damaged in said sum by reason of such defective work.

Defendant states, that, exclusive of the retained percentages and the amount withheld for work completed after the contract time, it has in its hands and possession the sum of approximately Sixty Thousand ($60,000) Dollars, to apply toward the cost of the work yet to be completed under plaintiff's contract, and defendant states that said amount will be so applied to the completion of said work. But defendant says that it cannot complete the said work so left uncompleted by plaintiff with the amount now on hand, because of the present prevailing prices for said work, and that it is necessary that the damages suffered by this defendant be ascertained and paid over by the plaintiff in order that said work so contracted to be done by plaintiff may be put in and completed according to contract. And defendant says that it will require the sum of $88,951.31 above, and above the funds now in the hands of this defendant, to complete said work, as is shown by defendant's itemized statement of damages hereinbefore in this counterclaim set forth.

Wherefore, premises considered, defendant prays that an accounting be had to the work already done by the plaintiff, and an accounting as to the amounts already paid to plaintiff by this defend-

ant for said work; that a statement be made as to the balance due from either party; that a lien be declared in favor of the defendant upon the funds now in its hands representing retained percentages on work done and amount withheld for work done after the expiration of the contract time; that an order be made permitting this defendant to use said funds, and to effect the same against any claim of the plaintiff; that an accounting and statement be made of the work yet to be done in the District under plaintiff's said contract, and the amount, kind, character and quality of each, together with a statement as to the cost of such completion; and defendant prays that it have judgment against the plaintiff in the sum of Ninety-nine Thousand, Four Hundred ninety-eight and 36/100 ($99,-498.36) Dollars, being the amount required to complete the said plaintiff's contract and the amount overpaid to the plaintiff on asphaltic concrete wearing surface and the amount necessary to repair and replace the defective and inferior work already done by the plaintiff. And defendant further prays and moves this Hon-
107 orable Court that this cause be transferred to Equity so that this defendant may avail itself of the equities it has and so that, a proper statement of the affairs of the parties may be made and an account stated, and defendant prays for all other and further relief, both at law and in equity, to which it may be entitled.

W. H. ARNOLD,
FRANK S. QUINN,
Attorneys for Defendant.

STATE OF ARKANSAS,
County of Miller, ss:

John P. Kline, on oath states that he is Chairman of the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and that he has read the allegations of the above and foregoing answer and counterclaim, and that the statements therein are true to the best of his information, knowledge and belief.

JOHN P. KLINE.

Subscribed and sworn to before me, this the — day of June, A. D. 1920.

GUY H. LAMBETH,
Notary Public, Miller County, Ark.

My commission expired July 10th, 1923.

EXHIBIT "A."

Memorandum of Agreement.

This Memorandum Of Agreement made and entered into on this the 19th day of February, A. D. 1918, by and between the Board of Improvement of Paving Improvement District No. 20 of the City

of Texarkana, Arkansas, party of the first part, and the Burke Construction Company, a corporation, of Fort Smith, Arkansas, party of the second part, Witnesseth:

I.

It is agreed that Section Fourteen (14) (on page 11) of Proposal Form, Contract and Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, shall be amended to read as follows:

"The work to be done in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, shall be completed in its entirety on or before November 1, 1918. The party of the second part, in consideration of the extension of time from November 29, 1917, to November 1, 1918, for the completion of said work, shall pay to the party of the first part One half (½) of all overhead expenses incurred by the party of the first part from and after November 29, 1917; said overhead expenses include such expenses as the party of the first part may be put to by reason of this extension, and also the office expenses of the party of the first part, and the compensation of such inspectors as the party of the first part shall deem necessary to maintain upon the work, and the monthly salary of Two Hundred ($200) Dollars per month of the Engineer of the District. The amount herein provided for to be paid by the party of the second part, shall be deducted by the first party from the amount of each monthly estimate due to the party of the second part. At the expiration of the time limit herein specified, Section 15 of the Proposal Form, Contract and Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, shall be in full force and effect."

108

II.

If suit is brought against the party of the first part, calling in question the validity of this agreement, or the right of the party of the first part to make the same, the party of the second part shall defend such suit, at its expense. In the event of the failure of the party of the second part to defend any such litigation, after notice from the party of the first part so to defend, the party of the second part may employ counsel and may incur such other expenses as may be proper and necessary to defend said litigation, and the party of the second part shall reimburse the party of the first part for all funds expended in said defense. The party of the second part shall furnish to the party of the first part copies of all answers and pleadings filed in any such litigation.

If this agreement shall be set aside in any legal proceedings, because of want of authority in the party of the first part to make the same, then and in such event it is agreed that the original Section 14 of the Proposal Form, Contract and Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, shall immediately revive, and shall

then and thereafter be taken and considered as having been in full force and effect at all times, the same as if this agreement had never been entered into; and each and all of the terms and conditions of said original Proposal Form, Contract and Specifications
109 aforesaid, as the same existed before this agreement was entered into, shall be deemed, taken and considered as not having been altered or changed, but as being in full force and effect and as having been in full force and effect at all times. And if this agreement shall for any cause be set aside by the courts, no act of either party hereunder shall be taken as waiving any of the terms or conditions of said Original Proposal Form, Contract and Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas.

III.

All sections, terms, provisions and conditions of the original proposal form, contract and specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, signed by the respective parties hereto and dated the 29th day of November, 1916, except as expressly changed by this agreement, are hereby expressed retained. It is understood and agreed that the bond of the Burke Construction Company in favor of the party of the first part in the penal sum of $300,000, with the United States Fidelity & Guaranty Company of Baltimore, Maryland, and M. C. Burke and J. A. Burke, as sureties thereon, dated the 29th day of November, A. D. 1916, shall stand good for, extend to, and cover this agreement, as well as still remaining in full force and effect as to said original contract.

IV.

This agreement to be attached to and made a part of said proposal form, contract and specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, signed by the parties hereto and dated on said 29th day of November, 1916.

Witness the hands and seals of the parties hereto, in triplicate, the day and year herein above first written.

THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT NO. 20 OF THE CITY OF TEXARKANA, ARKANSAS,
By JOHN P. KLINE, *Char.*,
Party of the First Part.

[SEAL.] THE BURKE CONSTRUCTION COMPANY,
By M. C. BURKE,
Party of the Second Part.

110 (*Extension of Bond of Burke Construction Company.*)

In consideration of the extension of the time to the Burke Construction Company, from November 29, 1917, to November 1, 1918, to complete the street improvements in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, we and each of us agree that the bond of the said Burke Construction Company in favor of the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, dated November 29, 1916, and conditioned in the penal sum of $300,000 to faithfully perform the contract of said Burke Construction Company for the construction of the street improvements in said Paving Improvement District No. 20, shall still remain in full force and effect, and that the said bond shall cover and stand good for the faithful performance of the attached agreement [between] the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and the Burke Construction Company, providing for an extension of time for completion until November 1, 1918, as well as still remaining in full force and effect as to said original Proposal Form, Contract and Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas.

Witness our hands and seals on this the 19th day of February, A. D. 1918.

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND,

By ——— ———.

M. C. BURKE.

J. A. BURKE.

EXHIBIT "B."

Agreement Extending Time for Completion of Work in Paving Improvement District Number Twenty, of the City of Texarkana, Ark.

This Agreement, made and entered into on this 7th day of January, A. D. 1919, by and between the Board of Improvement of Paving Improvement District Number Twenty of the City of Texarkana, Arkansas, as party of the first part, and the Burke Construction Company, a corporation, domiciled in St. Louis, Missouri, but with
111 its principal place of business in Arkansas at Fort Smith, as party of the second part, Witnesseth:

Whereas, the parties hereto did on the 29th day of November, A. D. 1916, enter into an agreement whereby the second party was to build and construct the street improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas,

the said Agreement being designated "Proposal Form, Constract and Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas," and in said Agreement it was specified that the said improvements should be completed within one year from the date thereof;

And, Whereas, an agreement was entered into by the respective parties hereto, dated the 19th day of February, A. D. 1916, whereby the time for completing said improvements was extended to November 1, 1918;

And Whereas, it is now desired to extend the time for completing said improvements in said Paving Improvement District No. 20, to and until November 1, 1919;

Now, Therefore, It is agreed, by and between the respective parties hereto, as follows, to-wit:

1. The time for completing the street improvements in said Paving Improvement District No. 20 of the City of Texarkana, Arkansas, shall be, and hereby is, extended to November 1, 1919. The provisions of Section 15 of the Agreement of November 29, 1916, regarding liquidated damages, are hereby suspended for the period covered by the extension of time herein agreed upon. At the expiration of the time limit herein specified, Section 15 of said Agreement of November 29, 1916, shall be and become effective.

2. The extension of time to November 1, 1919, is granted and accepted upon the consideration that the party of the second part shall bear and pay one-half of the overhead expenses of the party of the first part as the said expenses are named and specified in the agreement of the parties hereto dated February 19, 1918, being Paragraph 1 of said agreement. The obligation to bear said one-half of said overhead expenses shall commence on and date from the first day of November, A. D. 1918, and shall continue until November 1, 1919, and payments of said amounts shall be made at the times and in the manner as provided in said Paragraph 1 of said agreement of February 19, 1918.

112 3. It is the intention of the parties hereto, to extend the time of completion of the work in said Paving Improvement District No. 20, until November 1, 1919, upon the same terms and conditions as are prescribed in the agreement mentioned above and signed by the parties hereto and dated February 19, 1918. It is expressly agreed and understood that all of the terms and conditions of the original agreement of November 29, 1916, together with such alterations thereof as have been agreed to in writing by the parties hereto and the bondsmen of the party of the second part, as well as all of the terms and provisions of the agreement of February 19, 1918, are retained, re-agreed to and declared to be in full force and effect, except where expressly changed by this present agreement.

4. The party of the second part agrees that its bond dated the 29th day of November, 1916, in the penal sum of Three Hundred Thousand ($300,000) Dollars, executed to the party of the first

part and signed by M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company of Baltimore, Maryland, as sureties, and the Burke Construction Company as principal, conditioned to faithfully perform the said agreement of November 29, 1916, shall stand good for, extend to, and guarantee, the faithful performance of this present agreement; and the said bond shall still stand good for, extent to, and guarantee the faithful performance of said agreement of November 29, 1916, with such alterations thereof as have been agreed to in writing by the parties hereto and the bondsmen of the party of the second part; and the said bond shall still stand good for, extend to, and still guarantee, the faithful performance of the agreement of the parties hereto dated February 19, 1918.

Witness the signatures and seals of the respective parties hereto, on the day and year first herein above written, the party of the first part signing by John P. Kline, Chairman, Paul G. Huckins, Secretary, and Milton Winham, member, and the party of the second part signing by —— ——, its ——, who is hereunto duly authorized.

BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT NO. 20 OF THE CITY OF TEXARKANA, ARKANSAS,

113 JOHN P. KLINE,
Chairman;
PAUL G. HUCKINS,
Secretary;
MILTON WINHAM,
Member;
Party of the First Part.

BURKE CONSTRUCTION COMPANY,
By M. C. BURKE,
Pres.,
Party of the Second Part.

Agreement of Bondsmen of The Burke Construction Company, to Extension of Time to Complete the Street Improvements in Paving Improvement District No. 20 of the City of Texarkana, Arkansas.

In Consideration of the extension of time to the Burke Construction Company to complete the Street Improvements in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and for other good and valuable considerations, we, the undersigned bondsmen upon the bond of the Burke Construction Company made in favor of the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, dated November 29, 1916, conditional in the penal sum of Three Hundred Thousand ($300,000) Dollars for the faithful performance of the contract entered into between the Board of Improvement of said Paving Improvement District No. 20 as party of the first part and the Burke Construction

Company as party of the second part, dated November 20, 1916, covering the building and constructing of the street improvements to be made in said Paving District No. 20, hereby agree that our said bond in said sum of $300,000 so given as aforesaid and dated said November 29, 1916, shall stand good for, extended to, and guarantee the faithful performance of the agreement of extension entered into between said Board of Improvement of said Paving Improvement District No. 20, and the Burke Construction Company, dated the 7th day of January, A. D. 1919 and providing for extension of time until November 1, 1919, for the completion of said street improvements. We further agree that said agreement of extension dated the 7th day of January, A. D. 1919, and its terms and provisions, shall be taken and considered as integral parts of this instrument.

114 In Witness Whereof, we, and each of us hereunto affix our signatures, on this the 7th day of January, A. D. 1919, the United States Fidelity & Guaranty Company signing By —— its ——, who is hereunto duly authorized, and affixing its corporate seal.

UNITED STATES FIDELITY AND GUARANTY CO.,
By WM. M. HALL,
Counsel for Department of Middle South-Okla. Miss. & Tenn. & Attorney in Fact.
M. C. BURKE.
JAS. A. BURKE.

(EXHIBIT C.)

This Memorandum of Agreement, Had and entered into this 12th day of April, 1919, by and between the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, party of the first part and the Burke Construction Company of Fort Smith, Arkansas, party of the second part, Witnesseth:

That the curbing and guttering upon the streets in paving Improvement District No. 20 lying east of State Line Avenue and west of Hazel Street, and lying north of Broad Street and South of Seventh Street, may be constructed in accordance with the attached blue print designated, "Typical cross-sections Showing Relaid Stone and Concrete Gutter Construction as contemplated by Resolution of April 15, 1918, passed by the Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas." Which said blue print attached is made a part of this Agreement. The said gutter construction shall be put in under the direction of the Engineer for said District No. 20, and shall be either stone or concrete as directed by said Engineer. If relaid stone gutter shall be ordered in by the Engineer, the same shall be constructed in accordance with the blue print attached, and be of the dimensions specified thereon, and shall be constructed in accordance with specifications for relaid stone gutter, Item 25, Proposal Form, Contract and Specifications for Street

Improvements to be made in Improvement District No. 20. The price for such relaid stone gutter shall be the price bid for said relaid stone gutter, Item 25, plus seven (7) cents per lineal foot. That is to say, the price to be paid for the relaid stone gutter when
115 laid according to the attached blue print, shall be seven cents additional to the price bid and specified for relaid stone gutter, and said seven cents additional to be per lineal foot.

Concrete gutter when ordered in according to the attached blue print, shall be constructed in accordance with the specifications for concrete gutter, Item 21, of original specifications, and the same price shall be paid for concrete gutter constructed according to the blue print attached as is set out and specified for concrete gutter under said Item 21; and said new form of concrete gutter shall be of the design and thickness as shown upon said blue print attached.

Witness the signatures of the parties hereto, on the day and year first herein above written. To be attached to and made a part of original contract between the parties hereto designated "Proposal Form, Contract and Specifications for Street Improvements, to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas," and dated November 29, 1916.

(Signed) BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT NO. 20 OF THE CITY OF TEXARKANA, ARKANSAS,

By JOHN P. KLINE,
Chairman.

THE BURKE CONSTRUCTION COMPANY,

By M. C. BURKE,
President.

We, the undersigned bondsmen of the Burke Construction Company, upon its contract with the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, agree that the foregoing agreement may be entered into regarding the construction of new form of gutter in said Paving Improvement District No. 20. This April 12, 1919.

UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MARYLAND,

By WM. M. HALL,
Atty. in Fact.

M. C. BURKE.

J. A. BURKE.

116 (EXHIBIT D.)

Statement of Defective and Rejected Work in Paving Improvement District No. 20, Texarkana, Ark.

Item No.	Description.	Location.	Amount rejected.
21	Concrete Gutter.....	Pecan St. at 10th, 13th 14th & 15th Sts.	302 Sq. Ft.
21	Concrete Gutter.....	Hickory Street at 10th & 7th....	161 " "
25	Relaid Stone Gutter...	Ash St. 3rd to 5th.....	360 Sq. Yds.
25	Relaid Stone Gutter...	Hickory, 3rd to 4th.....	170 " "
25	Relaid Stone Gutter...	Broad to 3rd on Ash Street.....	170 " "
26	Relaid Brick Gutter...	NW Corner 5th & Hickory, SW Corner 7th & Hickory.....	10 " "
26	Relaid Brick Gutter...	North side 9th East of Hickory..	80 " "
27	6 inch gravel base New	Entire untopped portion.....6,577 Sq. Yds.	
28	New 7 inch gravel base	Untopped portion.....1,940 Sq. Yds.	
31	2 inch Asphaltic-Concrete Topping.	Beech 4th to 5th; 9th and Hickory; Pecan between 12th & 13th; Pecan and Short 10th; Short 10th East to West boundary; Hickory to Short 10th; 7th on Pecan to Hickory; 5th just west of Beech; 4th at Alley between Ash and Beech, Pecan 5th to 6th; 14th -treet west of Hickory, and 15th Street west of Hickory.....2,020 Sq. Yds.	

(Demurrer and Reply to Counter-claim in Law Case No. 439.)

(Filed in the U. S. District Court July 20, 1920.)

Now comes the plaintiff, the Burke Construction Company, and for its plea to the counterclaim herein says:

That the defendants are not entitled to maintain any action whatever on its counterclaim as against this plaintiff by reason of the following facts:

On or about the 19th day of January, 1920, the defendant District served upon this plaintiff a notice in writing to resume work in the District under Section 16 of the Contract mentioned in the complaint and in said notice advised this plaintiff that it would, unless work was begun on the District within ten days, take over and complete the work in said District under the provisions of Section 16 of the Contract sued on, and thereafter, on or about the 9th day of February, 1920, the defendant did take over said work and give this plaintiff notice thereof and in said notice specified that the
117 work was being taken over and would be completed in accordance with the terms of Section 16 of said Contract. Plaintiff says that by virtue of the said notice and the action of the Board in taking over said contract, the defendant District and its Board are not entitled under the express terms and provisions of said Section 16 to bring any claim whatsoever as against this plaintiff until after the work has been completed. That by the provisions of said Section

16 it is provided that the work when taken over should be done by the District either by contract or by day labor and the expense thereof should be deducted from moneys due to this plaintiff, and in the event that such expense is less than the amount due and payable for the work under the contract, then that the contractor should receive the difference, and in the event the expense should be greater than such amount, then that the Bondsmen or Surety should make good the difference.

Plaintiff says that the work in the District has not been completed by the Board and that until the same has been completed and until all the funds on hand have been exhausted, the District is not entitled to maintain any action whatsoever against this plaintiff on account of any damages or excess costs over the contract price sustained by the District in completing said work, and that by reason of the premises the action of the District on its counterclaim herein is prematurely brought and the provisions of said contract pertinent hereto are her-by [pled] in abatement of the counterclaim in this cause.

Wherefore, plaintiff prays judgment of this its Demurrer.

11.

For reply to the counterclaim and set off of the Defendants herein, if required to plead further thereunto, the Plaintiff says:

It denies that it breached the contract in any of the particulars named, mentioned and set out either in the answer or in the counterclaim. It is not advised, has no information sufficient to form a belief, and consequently denies that there was executed a memorandum agreement affecting and modifying the form of the stone and concrete curb and gutter under date of April 12, 1919, as alleged, and for the same reason denies that the purported copy thereof, marked "Exhibit C" is a copy of any such agreement; it denies that the Defendant District has carried out and performed the terms and conditions of the contract and extension agreement, as is
118 alleged, and denies that it has in any manner violated or breached the same or any one of them in any particular whatever.

This plaintiff denying any breach of the contract on its part, says that even though there was a breach that the Defendants have not been damaged in any sum whatsoever by reason thereof. It admits that a good portion of the work yet remains uncompleted, but alleges the truth to be that but for the illegal and wrongful actions of the engineer and of the Board, complained of in the original complaint, all of said work long since would have been done.

It denies that there yet remains to be done the amount of work mentioned and specified in each of the various items set out in the counterclaim and denies that said work will cost the Defendant District for the respective items the sum alleged in said counterclaim and alleges the truth to be that said work can and should be done for a very much less sum of money on each of the items than is named in said counterclaim.

It denies that by reason of any breach of the contract on its part, or by reason of any failure to perform the contract by it the said District has suffered damage in the sum of $88,951.31, or in any other sum of money.

It admits that a large sum of money due this plaintiff for retained percentages is being withheld by the Defendants, But alleges that the sum is in excess of that named in the counterclaim; It admits that there is due it by the District a large sum of money in excess of $4,500.00 for work done in November and December 1919, but denies that the Defendant District withheld the said sum because Plaintiff's contract had expired, and denies that Defendant District was without authority to pay therefor; it likewise denies that said sums were withheld by Defendant District because it had the right to withhold estimates on the ground that the work was not progressing satisfactorily and denies that under the contract it had the right so to do under the existing circumstances.

Plaintiff denies that it is insolvent, but admits that it is a non-resident, and denies that the Defendant District is entitled to set off either said retained percentages or moneys due for work done in November and December, 1919, as against any claim of this Plaintiff.

Plaintiff denies that the Defendants are entitled to renounce the maintenance requirements mentioned and specified in Sec-
119 tions 26 and 30 of the contract or by any addenda to said contract, and denies that it [abondoned] the work, and denies that it renounced the same or renounced any obligation imposed upon it under the contract, and denies that thereby it breached the contract in any particular and denies that by reason thereof it has been overpaid in any sum whatsoever on account of any one of the items mentioned and specified in Defendants counterclaim, and denies that by reason thereof, the Defendant District has been damaged in any particular whatsoever, or in any sum. It denies that it has failed to perform the contract on its part, or to furnish maintenance bond as required thereunder, and denies that by reason of anything done by it, the District is entitled under said contract to elect to waive maintenance bond, and denies that by reason of any such election the Defendant District has become entitled to a reduction on any of the work done in any of the particulars mentioned and specified in said counterclaim.

Plaintiff denies that any of the work mentioned and specified in the counterclaim, and especially denies that any part of items 21, 25, 27, and 31, in said counterclaim, or any portion thereof, has not been done in a good and workmanlike way and denies that any of the same is inferior or shoddy or [defectibe] in any particular whatsoever, but alleges the truth to be that all of said work was done under the supervision of the said District and its engineer and its inspectors on the job, and all of said work was duly approved by said engineer and said inspectors. It denies that any of said work will have to be replaced or repaired, and denies that on account thereof, the District has been damaged in the sum of $7,105.67, or in any other sum of money.

Plaintiff is not advised, and has no information sufficient to form

a belief, and consequently denies that said District only has sixty thousand dollars on hand to apply to the work in the District above the retained percentages and other sums due this Defendant, which are withheld, and for the same reason denies that said work can not be completed with the funds available to the District to apply thereon, and denies that it will require in addition to the funds on hand and other sums retained the sum of $88,951.31 to complete said Contract, but alleges that the same can be completed with the funds on hand in the District and with the funds available to it, and that the same can be constructed at little, if any, expense over and above the price at which it was contracted by this Plaintiff.

120 Plaintiff denies that this cause is of an equitable nature or that the Defendant is entitled to have the same transfered to equity, and says that the same is purely an action at law for breach of contract upon which the plaintiff is entitled, under the Constitution and laws of the United States and the State of Arkansas, to a trial by jury.

Wherefore, having fully answered, Plaintiff prays that the Defendants may take nothing by reason of their counterclaim herein, and that it may have judgment as prayed in its original complaint.

JAMES B. McDONOUGH,
JAMES D. HEAD,
Attorneys for Plaintiff.

(Order, May 13, 1920, Granting Plaintiff Leave to Amend Summons and Granting the Paving Improvement District No. 20 Time to Further Plead, etc., in Law Case No. 439.)

No. 439. Law.

THE BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

PAVING IMPROVEMENT DISTRICT No. 20 OF TEXARKANA, ARKANSAS, John P. Kline, Paul Huckins and Milton Winham, Defendants.

Now comes the plaintiff, by its attorney J. D. Head, and the Board of Improvement District No. 20 of Texarkana, Arkansas, by their attorneys W. H. Arnold and Frank S. Quinn, and the court takes up for consideration and disposition the motion to quash service of the summons herein in so far as it affects the said Board of Improvement and the court finds that the summons is irregular informal and insufficient without amendment directing the summons to said Board, and thereupon the plaintiff files a motion for leave to so amend said summons which is granted, which amendment thereupon being made, the said Board asked leave which is granted to further plead herein, and it is ordered that plaintiff Burke Construction Company pay the costs of the motion and orders thereon hereinbefore mentioned.

(*Order, May* 15, 1920, *Granting Plaintiff Leave to Amend Second Amended and Substituted Complaints and Cause Dismissed as to John P. Kline et al. in Law Case No.* 439.)

This day comes the plaintiff by J. D. Head its attorney and comes the defendants by W. H. Arnold and Frank Quinn
121 their attorneys and comes on to be heard plaintiff's application for leave to amend its complaint and said application being granted by the court the plaintiff accordingly amends its second amended and substituted complaint so as to make it a suit against Board of Improvement of Paving Improvement District No. 20, of Texarkana, Arkansas, and John P. Kline, Paul G. Huckins and Milton Winham as members of said Board of Improvement, and it is ordered by the court that this cause proceed under the name and style of Burke Construction Company plaintiff vs. Board of Improvement of Paving Improvement District No. 20, of Texarkana, Arkansas, and John P. Kline, Paul Huckins and Milton Winham as members of said Board, Defendants. And on the motion of Defendants John P. Kline, Paul G. Huckins and Milton Winham, now filed, that they be dismissed as individuals from the complaint, it is by the court further considered and ordered that the said John P. Kline, Paul G. Huckins and Milton Winham, as individuals, be dismissed from this cause with their costs.

(*Order, May* 17, 1920, *Overruling Motion of Defendant to Require Plaintiff to Paragraph and Number the Paragraphs of Its Complaint, in Law Case No.* 439.)

No. 439. Law.

THE BURKE CONSTRUCTION COMPANY, Plaintiff,

vs.

BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20 of Texarkana, Arkansas, and John P. Kline, Paul Huckins, and Milton Winham, Defendants.

This day comes the plaintiff by J. D. Head, [it-] attorney, and come the defendants by W. H. Arnold and Frank S. Quinn their attorneys and comes on for consideration the motion of the defendant Board of Improvement to require plaintiff to paragraph and number the paragraphs of its complaint.

Said motion having been argued and submitted the court being well and sufficiently advised in the premises doth overrule the same. To the action of the court in overruling said motion said defendant duly excepted at the time. By consent this cause is set for trial July 20, 1920.

(*Order, May* 18, 1920, *Requiring Plaintiff to Give Bond for Costs, in Law Case No.* 439.)

This day comes the plaintiff by J. D. Head its attorney and comes the defendant Board of Improvement by W. H. Arnold
122 and Frank S. Quinn its attorneys, and defendant files motion to require plaintiff to give bond for costs in the above entitled cause. Said motion being conceded by plaintiff is sustained, and it is ordered that plaintiff file good and sufficient cost bond on or before June 1, 1920.

(*Demurrer to Bill of Complaint Overruled; Motion to Strike Out Certain Parts of the Complaint Overruled; Motion to Require Plaintiff to Make Its Complaint More Definite and Certain Overruled, June* 14, 1920, *in Law Case No.* 439.)

The demurrer of defendant Board of Improvement to the complaint herein having been heretofore argued and submitted, the court being well and sufficiently advised in the premises doth overrule said demurrer. To the action of the court in overruling said demurrer defendant duly excepted at the time.

The motion of defendant Board of Improvement to strike certain paragraphs from the complaint herein having been heretofore argued and submitted, the court now being well and sufficiently advised in the premises doth overrule said motion. To the action of the court in overruling said motion defendant duly excepted at the time.

The motion of defendant to require plaintiff to make its complaint more [def*e*inite] and [cer*a*tin] herein having been heretofore argued and submitted, the court being now well and sufficiently advised in the premises doth overrule said motion. To the action of the court in overruling said motion defendant duly excepted at the time.

(*Motion of Defendant to Transfer Cause to the Equity Side of the Docket Overruled; Plaintiff's Demurrer to Defendants' Counterclaim Overruled, July* 20, 1920, *in Law Case No.* 439.)

This day comes the plaintiff by James B. McDonough and J. D. Head, his attorneys, and come the defendants by W. H. Arnold and Frank S. Quinn their attorneys, and comes on to be heard defendants' motion to transfer this cause to Equity. Said motion being argued by counsel and submitted, the Court being well and sufficiently advised in the premises doth overrule the same. To the action of the Court in overruling said motion the defendants duly excepted at the time. Thereupon plaintiff files demurrer and reply to [*to*] defendants' counter-claim. Said demurrer coming
123 on to be heard, the court having heard the argument of counsel and being well and sufficiently advised in the premises doth overrule said demurrer. To the action of the court in overruling the said demurrer to the counterclaim the plaintiff duly excepted at the time.

(*Jury Impaneled; Trial July* 20, 1920, *in Law Case No.* 439.)

This day comes the plaintiff by James B. McDonough and J. D. Head his attorneys, and come the defendants by W. H. Arnold and F. S. Quinn, their attorneys, and the parties announcing ready for trial come the following named persons as jurors, to-wit:

Ernest Wells	S. F. Leslie
Levi Rodgers	R. M. Eades
I. A. Cobb	John E. James
Harvey C. Campbell	John F. Lewis
W. Martin Hendricks	Jim Bryson
Burt Pride	E. L. Owen

twelve good and qualified electors of the Western District of Arkansas, Texarkana Division, duly selected, impaneled and sworn to try the issues joined. Having heard the evidence adduced, at the hour of adjournment the further consideration of this case is postponed until to-morrow morning 8½ O'clock and the jury permitted to separate under the admonition of the court until that hour.

(*Trial, July* 21, 1920, *in Law Case No.* 439.)

This day come the parties thereto by their attorneys and come the jury heretofore impaneled and sworn herein, as on yesterday, and the trial of this cause proceeds. Having heard the evidence adduced, at the hour of adjournment the further consideration of this cause is postponed until tomorrow morning at 8 o'clock.

(*Trial July* 22, 1920, *in Law Case No.* 439.)

This day come the parties hereto by their attorneys and comes the jury heretofore impaneled and sworn herein, as on yesterday, and the trial of this cause proceeds. Having heard the evidence adduced, at the hour of adjournment the further consideration of this cause is postponed until tomorrow morning at 8 o'clock and the jury permitted to separate under the admonition of the court until that hour.

124 (*Trial July* 23, 1920, *in Law Case No.* 439.)

This day come the parties hereto by their attorneys and comes the jury heretofore impaneled and sworn herein, as on yesterday, and by agreement of counsel, now made in open court, Levi Rodgers, one of the jurors, by reason of sckness in his family, is excused, and the trial proceeds with the remaining eleven jurors. Having heard the evidence adduced, at the hour of adjournment the further consideration of this cause is postponed until to-morow morning at 8 o'clock and the jury permitted to separate under the admonition of the court until that hour.

(*Trial, July* 24, 1920, *in Law Case No.* 439.)

This day come the parties hereto by their attorneys, and comes the jury of eleven as it remained on yesterday, and the trial of the cause proceeds. Having heard the evidence adduced, at the hour of adjournment the further consideration of this cause is postponed until Monday morning 8 o'clock, July 26, 1920, and the jury permitted to separate under the admonition of the court until that hour.

(*Trial, July* 26, 1920, *in Law Case No.* 439.)

This day come the parties hereto by their attorneys and come the jury of eleven as on Saturday July 24, 1920, and the trial of this cause proceeds. Having heard the evidence adduced, at the hour of adjournment the further consideration of this cause is postponed until to-morrow morning at 8 o'clock and the jury permitted to separate under the admonition of the court until that hour.

(*Trial, July* 27, 1920, *in Law Case No.* 439.)

This day come the parties hereto by their attorneys and comes the jury of eleven as on yesterday and the trial of this cause proceeds. Having heard the remainder of the evidence, at the hour of adjournment the further consideration of this cause is postponed until to-morrow morning at 8 o'clock, and the jury permitted to separate under the admonition of the court until that hour.

125 (*Trial, July* 28, 1920, *in Law Case No.* 439.)

This day come the parties hereto by their attorneys and comes the jury of eleven as on yesterday, and the trial of this cause proceeds. Having heard the argument of counsel and receiving the charge of the court the jury retired for deliberation; and at the hour of adjournment, a verdict not having been agreed upon, the further consideration of this cause is postponed until tomorrow morning at 8 o'clock and the jury permitted to separate under the admonition of the court until that hour.

(*Trial, July* 29, 1920; *Renewed Motion of Defendant to Transfer Cause to Equity Side of Docket Overruled; Motion of Defendant for Special Findings of Facts by the Jury, Granted; Jury Discharged, etc., in Law Case No.* 439.)

This day comes the Plaintiff by James D. Head its Attorney, comes the Defendants by W. H. Arnold and F. S. Quinn their Attorneys, and comes the jury of eleven as on yesterday. Defendants file motion in renewal of its motion to transfer to equity, and for the appointment of an auditor. Said motion coming on to be heard, the Court being well and sufficiently advised in the premises doth overrule the same. To the action of the Court in overruling said motion the De-

fendants duly excepted at the time. The Defendant also files motion for special findings of facts by the jury. Said motion coming on to be heard, the Court being well and sufficiently advised in the premises doth grant said motion and submit to the jury for special findings the following special questions to-wit:

"No. 1. State how much it would cost Improvement District No. 20 to complete the unfinished work as shown by the testimony, as of date February 9, 1920, which the contract calls for, over and above the contract price of the Burke Construction Company?

"No. 2. If you find that the District was damaged by reason of any work of the Burke Construction Company not complying with the specifications and which has been paid for, what was the amount of such damage?

"No. 3. How much do you find, if anything, that Paving Improving District No. 20 should receive on account of the waiver of said District of that part of the contract requiring the Burke Con-
126 struction Company to make a maintenance bond to maintain the work for a five year period?"

To the granting of said motion and the submitting of such special questions to the jury for special findings, the Plaintiff objected on the ground that the motion was out of time, and on that ground alone, and duly excepted to the ruling and action of the Court thereon.

Whereupon the jury retired for further deliberation, and after deliberation return- into open court and make known to the Court that they are wholly unable to agree upon a verdict in this case; and the Court being satisfied that the jury cannot agree upon a verdict and that further deliberation will not avail, it is ordered that the jury be discharged from the further consideration of the case.

Transcript of all Papers and Record Entries in Case No. 692, Board of Improvement of Paving Improvement District No. 20 vs. Burke Construction Company.

Transferred from the Chancery Court of Miller County, Arkansas, to District United States Court of the Western District of Arkansas, Texarkana Division.

(Bill of Complaint in the Chancery Court of Miller County, Arkansas, in the case of John P. Kline et al., as the Board of Improvement, etc., vs. Burke Construction Company et al., No. 692.)

In the Chancery Court of Miller County, Arkansas.

JOHN P. KLINE, MILTON WINHAM and PAUL G. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, Plaintiffs,

VS.

THE BURKE CONSTRUCTION COMPANY, and M. C. BURKE and J. A. Burke, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, Defendants.

Come John P. Kline, Milton Winham and Paul G. Huckins as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, the plaintiff herein by W. H. Arnold and Frank S. Quinn, the attorneys for said Board of Improvement, and for cause of action against the defendants, the Burke Construction Company, M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company, respectfully allege
127 states and shows to this Honorable Court:

The plaintiff Board of Improvement was on the 12 day of March, A. D. 1914, duly created, formed and constituted, pursuant to law, as the Board of Improvement for said Paving Improvement District No. 20 of the City of Texarkana, Arkansas, with John P. Kline, Milton Winham and Paul G. Kuckins as members thereof, for the purpose of putting in and constructing the street improvements and paving for which said Paving Improvement District No. 20 was organized, and this Board was at the time of its creation and is now authorized by law to make contracts and to sue and be sued. The defendant the Burke Construction Company is a foreign corporation, doing business in this state, with a designated agent upon whom process may be served. The defendants M. C. Burke and J. A. Burke are residents of the City of Fort Smith, Arkansas, and the defendant the United States Fidelity & Guaranty Company, is a corporation organized for the purpose of becoming surety upon bonds and undertaking, authorized to do business in this state, and having agents in Miller County, Arkansas, upon whom service of process may be had.

On the 29th day of November, A. D. 1916, this plaintiff and the defendant the Burke Construction Company, entered into a contract whereby the said defendant agreed and bound itself to put in, construct and complete the street improvements and paving to be done in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, at and for a unit price for each class of work to be done in said District, and said defendant further agreed to furnish all materials, equipment and labor necessary to properly put in said work, and further agreed and bound itself to construct and complete

the said street improvements and paving according to the specifications for said work. The unit prices for each class of said work, and the specifications therefor, are set out in the said contract, and for the time for the completion of said work was and in by the said contract fixed at one year from the date thereof. This Board, by the said contract, awarded said work to said defendant, and agreed to pay to the defendants the unit prices specified in said contract. Copy of said contract is hereto attached, marked Exhibit "A" and made a part of this complaint.

The defendant, not having completed said street improvements and paving within the time specified, the plaintiff granted to the defendant an extension of time to November 1, 1918, for the
128 completion of said work, the said extension being evidenced by written agreement of the parties dated the 19th day of February, A. D. 1918. The original agreement of November 29th, 1916, was and is by said extension agreement of February 19th, 1918, reagreed to, reaffirmed and declared to be in full force and effect. Copy of this extension agreement is hereto attached marked Exhibit "B" and made a part of this complaint.

At the expiration of the time limit provided for in the extension agreement just set out, the streets improvements and paving to be done under said defendant's contract *was* still uncompleted, and the plaintiff grant- to said defendant a further extension of time in which to complete said improvements, to and until November 1, 1919, the said second extension being evidenced by written agreement of the parties dated the 7th day of January A. D. 1919. The original contract of November 29, 1916, and the extension agreement of February 19, 1918, were and are by the said second extension agreement, re-agreed to, reaffirmed and declared to be in full force and effect. Copy of said second extension agreement is hereto attached marked Exhibit "C" and made part of this complaint.

To secure the fulfilling of said contract on the part of the defendant, the said defendant the Burke Construction Company executed and delivered to this plaintiff its bond, dated the 29th day of November, A. D. 1916, in the sum of Three Hundred Thousand ($300,000) Dollars, conditioned that said defendant, the Burke Construction Company, would faithfully perform its contract to construct and put in the street improvements and paving in said Paving Improvement District No. 20, according to the contract and specifications, and within the time specified; and the defendants M. C. Burke and J. A. Burke as co-partners doing a construction business, signed said bond as sureties thereon. And the defendant the United States Fidelity & Guaranty Company, also signed and executed said bond as a surety thereon. Copy of said bond is found attached as the last page to the original contract copy of which is filed herewith as Exhibit "A." And the defendants M. C. Burke and J. A. Burke and the United States Fidelity & Guaranty Company, agreed to and concurred in the extension agreement of February 19, 1918, and also agreed to and concurred in extension agreement of January 7, 1919, as will be seen by reference to the last page of copies of said extension agreements herewith filed and attached as Exhibits "B" and "C."

129 Plaintiff states that the defendant, the Burke Construction Company, on or about the first of January, 1917, entered upon the construction of the street improvements and paving covered by said original contract, and continued with said work under the said original contract and under the two extension agreements hereinbefore set out, up until November 1, 1919, when the said last extension agreement expired. That during the said period of time, the plaintiff complied with its part of said contract and duly made payments to said defendant, under the said contract and the extension thereof, for the work done. At the expiration of the said second agreement, the plaintiff stood ready to renew the defendants contract for another year, upon terms which to this Board seemed reasonable, but that no agreement was reached for a further extension, although at the time of the expiration of said second agreement the work to be done in this District under defendant's contract was not more than half completed, although the time for completion of said contract had expired, the defendant notwithstanding, proceeded with said work during the month of November, 1919, and up to about the first day of December, 1919. On or about the said last mentioned date, the defendant quit the said work and [*abonded*] the same, and discharged his employees, and removed his teams from the City of Texarkana, and shipped away asphalt and other paving materials, and on December 16, 1919, the said defendant, in [effert], notified the plaintiff by letter that unless this plaintiff discharged its Engineer the defendant would not return to or resume the work in the District.

Plaintiff states that in Section 16 of the specifications of the defendant's contract it is provided that if the defendant shall [abandon] the work in the District, the Board may give notice to the contractor to resume the work in the District, the Board may give notice to the contractor to resume the work, and if the said notice shall not be complied with within ten days and the work resumed, then the Board shall have the right to take over the said work. Pursuant to said Section 16, this plaintiff, on January 19, 1920, notified the Burke Construction Company, and its bondsmen to resume work in the District, but the defendants and its bondsmen wholly failed to comply with said notice and failed to resume the work. Thereupon the plaintiff, complying with the terms of the specifications, and in order to protect the work and in order to protect the plaintiff's and the defendant's rights and property, on February 9, 1920, took over the said work, and directed that
130 the defendants should have no further charge thereof.

Under the terms of said Section 16, the plaintiff was further authorized to, and did, take over the materials, machinery and equipment along the line of the work in the District belonging to the defendant the Burke Construction Company, used by it in putting in said work, and the said property is now in the hands of the Board and is being held and preserved by the Board, for use in finishing up said work. The plaintiff believed at the time, and still believes, that under the terms of defendant's contract the plaintiff was authorized, upon the abandonment of said work by said de-

fendant the Burke Construction Company, to take over the said property found along the line of work, and was and is authorized to hold the same for use in completing said work. A list of the property so found along the line of the work and so taken over by this plaintiff is hereto attached marked Exhibit "D" and made a part of this complaint.

Plaintiff shows that at the time of the expiration of the extension agreement of January 7, 1919, the last extension agreement, to-wit, on November 1, 1919, the plaintiff had in his hands the sum of Thirteen Thousand Seven Hundred Fifty-two and 45/100 ($13,752.45) Dollars or funds representing retained percentages held by the plaintiff upon estimates of work done by the defendant under its contract, the contract providing that 15% of the amount of the work done should be retained by this Board until all of the work to be done under the contract was entirely completed and accepted in accordance with the terms of the specifications. Plaintiff also shows that payment for the work done by the defendant after the time limit had expired, has been withheld by the Board, because the defendant's contract had, at the time of doing said work, expired, and had not and has not been renewed, and further because under the terms of specifications the Board had and has the right to withhold payment of estimates if the work in the District was or is not progressing in a satisfactory manner, which satisfactory progress was not then and not since said time been made in carrying forward said work.

Upon taking over the work provided for in said defendant's contract, it was the intention and purpose of this Board to take the said work over and complete the same, in so far as the funds on hand would permit, under the terms and conditions of Section 16 of the specifications embodied in said defendant's contract and
131 when the funds on hand were exhausted, then to call upon the Burke Construction Company and its bondsmen for a sufficient amount to complete, finish the said contract; and the said Burke Construction Company and its bondsmen were duly notified of the intention of this Board to proceed with said work under said Section 16. But carrying out said contract in accordance with the terms of said Section 16 has now been rendered impracticable, if not impossible, because, since the plaintiff took over said work, the defendant, the Burke Construction Company, has brought its suit in the United States Federal Court demanding a large sum, to-wit, the sum of $85,000, against Paving Improvement District No. 20 and against the individual members of this Board of Improvement District No. 20 and against the individual members of this Board of Improvement for damages for taking over said work, which said sum claimed as damages largely exceeds the total funds now in the hands of the Treasury of said Paving District, and which said claim now renders hazardous the expenditures of the funds of the District in carrying on the work under said section. Plaintiff avers that the failure of the defendant and its neglect to complete and finish its contract within the specified time, and its abandonment of the work, and its act and conduct in bringing suit for damages for tak-

ing over said work by this Board, evince an intention and purpose upon the part of the defendant to abrogate and renounce its said contract, and amount to and are an [abregation] and renunciation of said contract upon defendant's part, entitling the plaintiff to an accounting for the value and amount of work done under such contract, and also for an accounting as to the value and amount of work yet to be done thereunder; and further entitling plaintiff to claim and recover of and from the defendant and its bondsmen the amount necessary to finish the said contract.

Plaintiff states that it now has in its hands, aside from the amount due on retain percentages and for work done by the defendant during the month of November, 1919, the sum of Sixty Thousand (60,000) Dollars, the balance from the proceeds of the sale of an issue of $150,000 of bonds of this District; that said balance from the issue of bonds, together with the retained percentages and the amount due for November 1919 work, amount to the sum of approximately $77,000, and that said sum of $77,000 is all of the funds now available in the hands of this Board to finish and complete the street improvements and paving called for by the defendant's contract. Plaintiff states that upon the accounting as to the work to be done under said contract, it will be shown that sum of Eighty Thousand ($80,000) Dollars additional will be required to construct and complete the said work.

132 Plaintiff states that the jurisdiction of this court is invoked because this cause involved numerous and complicated accounts, in that the matters of the construction required by the contract have not been but about half completed and it is claimed by the plaintiff herein that all that is due the Burke Construction Company has been paid except retained percentages and the amount of work for November, 1919; the defendant the Burke Construction Company is claiming a balance due it of $85,500.00, arising from its contention that the Engineer of the District compelled extra sweeping from the top of the gravel base for the paving and that he was compelled to lay extra thickness of asphalt on the base to bring the street to grade, involving 40,000 square yards at 21 cents per square yard; said Burke Construction Company claims that certain curb and gutter was rejected by the Engineer on account of a claim that same was frozen or defective and said Burke Construction Company was required to take out other gutters; loss of time of curbing crews waiting for grade to set curbs; extra costs for unnecessary moves of the asphalt force from one place to another; loss of time of men and teams and asphalt plant stopped by Engineer or waiting at some place for the Engineer; claim of balance on concrete curbs and gutters; alleged profits on asphalt wearing surface and asphalt macadam, concrete paving and gravel; a claim of balance on November and December, 1919; estimates; claim of materials, bills and value of certain scrapers, tools, wagons, blacksmith outfit, road rollers, heating kettle, hot wagon, plows, Waterloo wagon and Austin Grader. There is a conflict between the theories of the plaintiff and the defendant Burke Construction Company with reference to the kind and character of work and as to the materials to be used

which the contract calls for, which involves the taking of much testimony and the statement of accounts upon the theory of each party upon practically every subject of said contract, including the character, quality and kind of curbing, guttering, the quantity and quality of gravel and the expense of preparing the same for use; the kind, quantity and quality of asphalt, asphalt macadam and brick work; and in general there is a conflict between plaintiff and defendant upon many subjects arising under said contract and there will be much accounting required with reference to the amount for which plaintiff is entitled to recover in order to complete said contract abandoned by the defendant as aforesaid.

Plaintiff further states that it is informed and believes, and so alleges and charges, that the defendant the United States Fidelity & Guaranty Company is the holder and in possession of certain
133 securities given to it by the Burke Construction Company and M. C. and J. A. Burke to indemnify the said United States Fidelity & Guaranty Company from loss on account of its signature upon said bond of $300,000. The nature, character and kind of the security so held by said United States Fidelity & Guaranty Company is unknown to the plaintiff, but the plaintiff is entitled to the right of subrogation in and to the said securities, and is entitled to discovery thereof, which discovery the plaintiff hereby prays.

Plaintiff alleges that they are serving as Board of Improvement under the Improvement District laws of the State of Arkansas, and while they receive no compensation for their labors, they are charged with grave sesponsibilities to the District and its taxpayers, and in the execution of the trust reposed in them they are informed and believe that they are authorized to apply to a Court of Equity for instruction and direction with reference to their duties and rights under the circumstances hereinbefore set out in regard to their future course of conduct under said contract and that the court should interpret said contract and direct what the Board should do with the equipment belonging to the said Burke Construction Company which the Board took over under a provision of said contract, and that they should be instructed what to do in reference to completion of the work under said contract, and that the court should find and declare the respective rights of the parties herein and render judgment accordingly.

Wherefore, plaintiff prays that an accounting be had between the plaintiff and the defendant, the Burke Construction Company, with reference to the work that has been done by said Company under said contract, that proper disposition be made of said equipment which the plaintiff took over under said contract, that the plaintiff be authorized to retain and use the said equipment, and also be authorized to retain and use the retained percentages which are being held by the Board on account of the work which has already been done, and that said amount be applied toward the completion of said contract; that court find and ascertain which will be required to complete said contract according to the terms and requirements thereof; that the court find that the defendant, the Burke Construction Com-

pany, has been fully paid for the work done by it according to said contract; that plaintiff be subrogated to all the rights and remedies of the United States Fidelity & Guaranty Company, one of the defendants herein, against the security which said Company
134 holds for having executed said contractor's bond, and that the plaintiff have judgment for the sum of $80,000 against said Burke Construction Company, M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company of Baltimore Maryland, which plaintiff alleges is the amount which will be required to complete said work in addition to the moneys that said Board has on hand; that plaintiff also have judgment for those damages which are provided for in the contract on account of the delay in completing said work; and for general relief.

W. H. ARNOLD,
FRANK S. QUINN,
Attorneys for Plaintiff.

STATE OF ARKANSAS,
County of Miller:

John P. Kline, on oath states, that he is a member of the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, the plaintiff in the above and foregoing complaint, and that he is Chairman of said Board; that he has read the allegations of the above and foregoing complaint, and that the same are true.

JOHN P. KLINE.

Subscribed and sworn to before me, the undersigned Notary Public on this the 19th day of March, A. D. 1920.

[SEAL.] GUY H. LAMBETH,
Notary Public, Miller County, Arkansas.

My Com. Expires July 10, 1923.

EXHIBIT "B."

Memorandum of Agreement.

This Memorandum Of Agreement, Made and entered into on this the 19th day of February, A. D. 1918, by and between the Board — Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, party of the first part and the Burke Construction Company, a corporation, of Fort Smith, Arkansas, party of the second part, witnesseth:

I.

It is agreed that Section Fourteen (14) (on page 11) of Proposal Form, contract and Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of
135 Texarkana, Arkansas, shall be amended to read as follows:

"The work to be done in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, shall be completed in its entirety on or before November 1st, 1918. The party of the second part, in consideration of the extension of time from November 29, 1917, to November 1st, 1918, for the completion of said work shall pay to the party of the first part One Half (½) of all overhead expenses incurred by the party of the first part from and after November 29, 1917; Said overhead expenses include such expenses as the party of the first part may be put to by reason of this extension, and also the office expenses of the party of the first part, and the compensation of such inspectors as the party of the first part shall deem necessary to maintain upon the work, and the monthly salary of Two Hundred ($200.00) Dollars per month of the Engineer of the District. The amount herein provided for to be paid by the party of the second part, shall be deducted by the first party from the amount of each monthly estimate due to the party of the second part. At the expiration of the time limit herein specified, Section 15 of the Proposal Form, Contract and Specifications for Street Improvements to be made in Paving Improvements District No. 20 of the City of Texarkana, Arkansas shall be in full force and effect."

II.

If suit is brought against the party of the first part, calling in question the validity of this agreement, or the right of the party of the first part to make the same, the party of the second part shall defend such suit, at its expense. In the event of the failure of the party of the second part to defend any such litigation, after notice from the party of the first part so to defend, the party of the first part may employ counsel and may incur such other expenses as may be proper and necessary to defend said litigation, and the party of the second part shall reimburse the party of the first part for all funds expended in said defense. The party of the second part shall furnish to the party of the first part copies of all answers and pleadings filed in any such litigation. If this agreement shall be set aside in any legal proceedings, because of want of authority in the party of the first part to make the same, then and in such event it is agreed that the original Section 14 of the Proposal Form, Contract and
136 Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, shall immediately revive, and shall then and thereafter be taken and considered as having been in full force and effect at all times, the same as if this agreement had never been entered into and each and all of the terms and conditions of said original Proposal Form, Contract and Specifications aforesaid as the same existed before this agreement was entered into, shall be deemed, taken and considered as not having been altered or changed, but as being in full force and effect and as having been in full force and effect at all times. And if this agreement shall for any cause be set aside by the Courts, no act of either party hereunder shall be taken as waiving of

any of the terms or conditions of said Original Proposal Form, Contract and Specifications for Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas.

III.

All sections, terms, provisions and conditions of the original Proposal Form, Contract and Specifications for Street Improvement to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, signed by the respective parties hereto and dated the 29th day of November, 1916, except as expressly changed by this agreement, are hereby expressly retained. It is understood and agreed that the Bond of the Burke Construction Company in favor of the party of the first part in the penal sum of $300,000 with the United States Fidelity & Guaranty Company of Baltimore, Maryland, and M. C. Burke and J. A. Burke, as sureties thereon, dated the 29th day of November, A. D. 1916, shall stand good for, extend to, and cover this agreement, as well as still remaining in full force and effect as to the original contract.

IV.

This agreement to be attached to and made a part of said Proposal Form, Contract and Specifications of Street Improvements to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, signed by the parties hereto and dated on said 29th day of November, 1916.

137 Witness the hands and seals of the parties hereto, in triplicate, the day and year herein above first written.

[SEAL.] THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20 OF THE CITY OF TEXARKANA, ARKANSAS,

By JOHN P. KLINE, *Char.*,

Party of the First Part.

BURKE CONSTRUCTION COMPANY,

By M. C. BURKE,

Party of the Second Part.

(*Extension of Bond of Burke Construction Company.*)

In Consideration of the extension of time to the Burke Construction Company, from November 29th, 1917, to November 1, 1918, to complete the street improvements in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, we and each of us agree that the bond of the said Burke Construction Company, in favor of the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, dated November 29th, 1916, and conditioned in the penal sum of $300,000. to faithfully perform the contract of said Burke Construction Company for the con-

struction of the Street improvements in said Paving Improvement District No. 20, shall still remain in full force and effect, and that the said bond shall cover and stand good for the faithful performance of the attached agreement between the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and the Burke Construction Company, providing for an extension of time for the completion until November 1st, 1918, as well as still remaining in full force and effect as to said original Proposal Form, Contract and Specifications for Street Improvement to be made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas.

Witness our hands and seals on this the 19th day of February, A. D. 1918.

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND,

By ——— ———, *Vice-Pres.*;

M. C. BURKE,

J. A. BURKE.

138 EXHIBIT "C."

Agreement Extending Time for Completion of Work in Paving Improvement District Number Twenty, of the City of Texarkana, Ark.

This Agreement, Made and entered into on this 7th day of January, A. D. 1919, by and between the Board of Improvement of Paving Improvement District Number Twenty of the City of Texarkana, Arkansas, as party of the first part, and the Burke Construction Company, a corporation, domiciled in St. Louis, Missouri, but with its principal place of business in Arkansas at Fort Smith, as party of the second part; Witnesseth:

Whereas, The parties hereto did on the 29th day of November, 1916, enter into an agreement whereby the second party was to build and construct the Street Improvement to be made in Paving Improvement District Number 20 of the City of Texarkana, Arkansas, the said agreement being designed "Proposal Form, Contract and Specifications for Street Improvements to be Made in Paving Improvement District No. 20 of the City of Texarkana, Arkansas," and in said agreement it was specified that the said improvement should be completed within one year from the date thereof;

And, Whereas, An agreement was entered into by the respective parties hereto, dated the 19th day of February, A. D. 1918, whereby the time for completing said improvements was extended to November 1st, 1918;

And, Whereas, It is now desired to extend the time for completing said improvements in said Paving Improvement District No. 20, to and until November, 1919;

Now, Therefore, It is agreed, by and between the respective parties hereto, as follows, to-wit:

1. The time for completing the street improvements in said Paving Improvement District No. 20 of the City of Texarkana, Arkansas, shall be, and hereby is, extended to November 1, 1919. The provisions of Section 15 of the agreement of November 29, 1916, regarding liquidating damages, are hereby suspended for the period covered by the extension of time hereby agreed upon. At the expiration of the time limit herein specified, Section 15 of said Agreement of November 29, 1916, shall be and become effective.

139 2. The extension of time to November 1, 1919, is granted and accepted upon the consideration that the party of the second part shall bear and pay one-half of the over-head expenses of the party of the first part as the said expenses are named and specified in the agreement of the parties hereto dated February 19, 1918, being Paragraph 1 of said Agreement. The obligation to bear said one-half of said overhead expenses shall commence on and date from the 1st day of November, A. D. 1918, and shall continue until November 1, 1919, and payments of said amounts shall be made at the times and in the manner as provided in said Paragraph 1 of said Agreement of February 19, 1918.

3. It is the intention of the parties hereto to extend the time of completion of the work in said Paving Improvement District No. 20, until November 1, 1919, upon the same terms and conditions as are prescribed in the agreement mentioned above and signed by the parties hereto and dated February 19, 1918. It is expressly agreed and understood that all of the terms and conditions of the original agreement of November 29, 1916, together with such alterations thereof as have been agreed to in writing by the parties hereto and the bondsmen of the party of the second part, as well as all of the terms and provisions of the agreement of February 19, 1918, are retained, re-agreed to and declared to be in full force and effect, except where expressly changed by this present agreement.

4. The party of the second part agrees that its bond dated the 29th day of November, A. D. 1916, in the penal sum of Three Hundred Thousand ($300,000) Dollars, executed to the party of the first part and signed by M. C. Burke, J. A. Burke, and the United States Fidelity Guaranty Company of Baltimore, Maryland, as sureties, and the Burke Construction Company as principal, conditioned to faithfully perform the said agreement of November 29, 1916, shall stand good for, extend to, and guarantee, the faithful performance of this present agreement; and the said bond shall still stand good for, extend to, and guarantee the faithful performance of said agreement of November 29, 1916, with such alterations thereof as have been agreed to in writing by the parties hereto and the bondsmen of the parties of the second part; and the said bond shall still stand good for, extend to, and still guarantee, the faithful performance of the agreement of the parties hereto dated February 19, 1918.

140 Witness the signatures and seals of the respective parties hereto, on the day and year first herein above written, the party of the first part signing by John P. Kline, Chairman, Paul G. Huckins, Secretary, and Milton Winham, member and the party of the second part signing by —— its ——, who is hereunto duly authorized.

BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20 OF THE CITY OF TEXARKANA, ARKANSAS,
By JOHN P. KLINE, *Chairman;*
PAUL G. HUCKINS, *Secretary;*
MILTON WINHAM, *Member,*
Party of the First Part.
BURKE CONSTRUCTION COMPANY,
By M. C. BURKE, *President,*
Party of the Second Part.

Agreement of Bondsmen of the Burke Construction Company to Extension of Time to Complete the Street Improvement in Paving Improvement District No. 20 of the City of Texarkana, Arkansas.

In Consideration of the extension of time to the Burke Construction Company to complete the Street Improvement in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and for other good and valuable considerations, we, the undersigned Bondsmen upon the bond of the Burke Construction Company made in favor of the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, dated November 29, 1916, conditioned in the penal sum of Three Hundred Thousand ($300,000) Dollars for the faithful performance of the contract entered into between the Board of Improvement of said Paving Improvement District No. 20, as party of the first part and the Burke Construction Company as party of the second part, dated November 29, 1916, covering the building and constructing of the street improvements to be made in said Paving District No. 20, hereby agree that our said bond in said sum of $300,000 so given as aforesaid and dated said November 29, 1916, shall stand good for, extended to, and guarantee the faithful performance of the agreement
141 of extension entered into between said Board of Improvement of said Paving Improvement District No. 20, and the Burke Construction Company, dated the 7th day of January, A. D. 1919, and provided for extension of time until November 1, 1919, for the completion of said street improvements. We further agree that said agreement of extension dated the 7th day of January, A. D. 1919, and its terms and provisions, shall be taken and considered as integral parts of this instrument.

In Witness Whereof, we, and each of us hereunto affix our signatures, on this 7th day of January, A. D. 1919, the United States

Fidelity & Guaranty Company signing by —— —— its ——, and affixing its corporate seal.

UNITED STATES FIDELITY & GUARANTY CO.,
By WM. M. HALL,
Counsel for Department of Middle South-Ark. Miss. & Tenn., and Attorney in Fact.
M. C. BURKE.
JAS. A. BURKE.

EXHIBIT "D."

Inventory of Machinery, Tools, Equipment, and Materials, on Line of the Work in Improvement District No. 20, Belonging to the Burke Construction Company, and Taken in Custody by Said Improvement District.

In Yard at Plant.

Description.	Condition.	Remarks.
1 Combined Blade Grader and Scarafier	Good.	Ohio Leader $435.
1 Spike Harrow	Fair.	
1 Sheet Metal Asphalt Dumping Bd.	"	
1 Asphalt Mixing Plant	Poor.	Completely erected but need overhauling before operation.
1 Kelley Springfield Asphalt Roller	Fair.	Steam Driven.
1 Portable Asphalt heating kettle	Good.	Littleford Bros. of Cincinnati, Mfgrs.
1 Fire Wagon	"	For Heating Rakes, Tamping & Smoothing Irons, etc.
1 Elevator Road Grader	"	
1 10-Ton Steam Roller	Fair.	Monarch $20069.
1 Austin Scarafier, Shop $483	Good.	
142 1 4-Cylinder Gasoline Tractor	Fair.	$463 Mfgrs. Plate No. —.
1 Empty tool box, wood	Poor.	
41 Bbls. No. 54 Texaco Asphalt Cement.		Under Laurel St. Viaduct. A number of barrels having bursted during to melting of asphalt which latter has spread over the ground.
10 Asphalt dumping wagons	Poor.	
1 Wooden water box	Good.	Made to fit ordinary wagon bed.
1 Gypsy Vice	"	4¼ jaws.
1 Hand Forge Blower	Good.	6" Jaws.
1 18 inch grind rock	"	
Course and fine sand		Amount indeterminate probably 50 tons, badly mixed.
Joplin Chats		Probably 100 Tons.

In Tool House at 516 East Broad St.

Description.	Condition.	Remarks.
8 Mattocks	Fair.	No handles.
10 Shovel Handles (D")	New.	
7 Hoe Handles	"	
3 Rake Handles	"	
4 Push Brooms	Good.	
4 3" diam. c 3' wood rollers	Fair.	
6 Pick Handles	Good.	
4 Scarafier teeth	New.	For Austin Grader.
1 10# stone hammer	Good.	
1 8# stone hammer	"	
1 Asphalt Mattock	Poor.	
1 Round Poll, Spike Hammer	Fair.	
13 Steel Chain Buckets	"	For hot and cold sand, Elevators on Plant.
1 5" Pipe line ladle	"	
1 Block, ⅜" Sheaves	"	
1 Block 2/5" "	"	
1 Block ¾" "	"	
1 Block 2/4" "	"	
1 Anvil	Good.	
4 Canvas Belts, 1 10", 1 8", 1 5"	"	
1 Small Hand Power Emory Wheel	"	New Stone required.
2 Jack Screws	Good.	
1 Rachet Jack	"	
6 Lanter-s	Fair.	
9 Scoop Shovels	"	
10 D Handle Dirt Shovels	"	
4 Sharp Shooters	Poor.	
23 Picks, 12 with handles,—Junk, Old Fittings, Chains, etc	Fair.	

143

In Dust House.

7 Wheel barrows	Fair.	
Limestone dust, approximately 1 car load	Good.	
3 Asphalt Tamping Irons	"	
2 " Smoothing Irons	"	
6 Asphalt Rakes, 1 without handle	"	
3 Asphalt Mattocks	"	
2 Mortar Hoes	Fair.	
3 Push Brooms, Fibre Bristles	"	
1 " " Hair	"	
4 Sheet Metal Templates, C. C. & Gutter	"	12" apron.
17 Sheet Metal Templates, C. C. & Gutter	"	24" "
34 Sheet Metal Templates, Concrete Gutter	"	Suppressed Curb.
2 16' Level Boards	"	
1 square 2-ply SOS Roofing, in roll	New.	

Miscellaneous.

2 4" Steel Tires 32 diam. Wagon Wheel	Fair.	Under Viaduct.
1 Rotary Screen, Motor Driven	"	Erected ready for operation on Blk. 3, Kirby's Addition.
2 empty Tool Boxes 5th and Hazel Streets	"	
1 Empty Lantern Box	"	
554 Texaco Asphalt, A. C. Kettle of Mixing Plant		80% full.

Filed and summons issued March 19, 1920.

J. T. DAVIS,
Clerk.

(*Summons and Return of Sheriff of Sebastian County, Arkansas, in Case No. 692.*)

The State of Arkansas to the Sheriff of Sebastian County:

You are commanded to summon Burke Construction Company, M. C. Burke and J. A. Burke, to answer in twenty days after the service of this summons upon them a complaint filed against them in the Chancery Court of Miller County, Arkansas, and warn them that upon their failure to answer said complaint that same will be taken for confessed; and you will make due return of this summons on the first day that said court is in session after twenty days after the date of the issuance hereof.

144 Witness my hand and the seal of said court this 19th day of March, 1920.

J. T. DAVIS,
Clerk.

STATE OF ARKANSAS,
County of Sebastian, ss:

On the 29th day of March, 1920, I have duly served the within writ by delivering a copy, and stating the substance thereof, to the within named M. C. Burke; for Plaintiff, and on the Burke Construction Company by delivering *to* a true copy thereof to M. C. Burke, President of said Company all at Ft. Smith, said County and State as I am herein commanded.

Fees 2 services.....	$1.00
Mileage	.20
	$1.20

Paid by Frank S. Quinn.

CLAUDE THOMPSON,
Sheriff,
By A. J. BERRY, D. S.

No. 692. Filed the 19th day of April, 1920.

J. T. DAVIS,
Clerk.

(*Summons and Return of Sheriff of Pulaski County, Arkansas, in Case No. 692.*)

The State of Arkansas to the Sheriff of Pulaski County:

You are commanded to summon Burke Construction Company to answer in twenty days after the service of this summons upon it a complaint filed against it in the Chancery Court of Miller County, Arkansas, and warn it that upon its failure to answer said complaint that same will be taken for confessed; and you will make due return

of this summons on the first day that said court is in session after twenty days after the date of the issuance hereof.

Witness my hand and the seal of said court this 19th day of March, 1920.

J. T. DAVIS,
Clerk.

145 STATE OF ARKANSAS,
County of Pulaski, ss:

On the 20th day of March, 1920, I have duly served the within writ by delivering a copy, and stating the substance thereof, to the within named Tom J. Terral, the Secretary of State of the State of Arkansas, in Pulaski County, Arkansas, the Burke Construction Company being a foreign Corporation as I am herein commanded.

W. E. TAYLOR,
Sheriff,
By E. S. JONES, *D. S.*

No. 692. Pd. $1.00. Filed the 19th day of April, 1920.
J. T. DAVIS,
Clerk.

(*Summons and Return of Sheriff of Pulaski County, Arkansas, in Case No.* 692.)

The State of Arkansas to the Sheriff of Pulaski County:

You are commanded to summon The United States Fidelity & Guaranty Company of Baltimore, Maryland, to answer in twenty days after the service of this summons upon it a complaint filed against it in the Chancery Court of Miller County, Arkansas, and warn it that upon its failure to answer said complaint that same will be taken for confessed; and you will make due return of this summons on the first day that said court is in session after twenty days after the date of the issuance hereof.

Witness my hand and the seal of said court this 23rd day of March, 1920.

J. T. DAVIS,
Clerk.

STATE OF ARKANSAS,
County of Pulaski, ss:

On the 24th day of Mch., 1920, I have duly served the within writ by delivering a copy, and stating the substance thereof, to Bruce T. Bullion, Insurance Commissioner for the State of Arkansas,
146 designated agent for service for the within named The United States Fidelity & Guaranty Co. of Baltimore, Maryland, as I am herein commanded.

W. E. TAYLOR,
Sheriff,
By J. J. HAWKINS,
D. S.

3-24-20 278 No. 692.

Service ..... $ .50
Mileage Pd. 60 ..... $ .10

Total ..... $ .60

Filed the 19th day of April, 1920.

J. T. DAVIS,
Clerk.
FRANK S. QUINN,
Texarkana.

(*Summons and Return of Sheriff of Miller County, Arkansas, in Case No.* 692.)

The State of Arkansas to the Sheriff of Miller County:

You are commanded to summon The United States Fidelity & Guaranty Company of Baltimore, Maryland, to answer in twenty days after the service of this summons upon it a complaint filed against it in the Chancery Court of Miller County, Arkansas, and warn it that upon its failure to answer said complaint that same will be taken for confessed; and you will make due return of this summons on the first day that said court is in session after twenty days after the date of the issuance hereof.

Witness my hand and the seal of said court this 19th day of March, 1920.

J. T. DAVIS,
Clerk.

STATE OF ARKANSAS,
County of Miller, ss:

On the 20th day of March, 1920, I have duly served the within writ by delivering a copy, and stating the substance thereof, to the within named United States Fidelity & Guaranty Co. of Balti-
147 more, Md., by delivering a copy and substance of this summons to F. W. Offenhauser, agent in Miller County, Arkansas, for said defendant, as I am herein commanded.

A. J. GURLEY,
Sheriff.

Paid cost.
No. 692. Filed the 19th day of April, 1920.

J. T. DAVIS,
Clerk.

(*Petition for Removal of Cause to Federal Court in Case No.* 692.)

To the Honorable the Chancery Court Within and for the County of Miller, State of Arkansas:

The petition of the Burke Construction Company, one of the above named defendants, shows as follows:

Your petitioner, The Burke Construction Company, alleges and shows to this Honorable Court, that it is one of the defendants in this suit, which suit is of a civil nature, and that the matter and amount in dispute in this cause exceeds the sum or value of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

The controversy herein is between citizens of different states, as herein shown. The plaintiffs, John P. Kline, Milton Winham and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, are citizens and residents of the County of Miller, State of Arkansas, and within the Western District of Arkansas, Fort Smith Division, and were such citizens and residents at the time of the commencement of this action, and still are such. The Board of Improvement of Paving Improvement District No. 20, is a board created under the laws of the State of Arkansas, and under the law is a citizen and resident of the County of Miller, State of Arkansas, and was such at the time of the commencement of this action, and still is such, and Paving Improvement District No. 20 is a body politic and corporate under the laws of the State of Arkansas and was at the time of the commencement of this action, and still is a citizen and resident within the meaning of the law, of the Western District of Arkanass, Texarkana Division. The Burke Construction Company is a corporation, organized and existing under the laws of the State of Missouri, and is a citizen and resident of the State of Missouri, within the meaning of the law entitling it to a removal of this cause, as herein prayed. The
148 said The Burke Construction Company was at the time of the commencement of this action, and still is such corporation, organized under the laws of the State of Missouri, and been authorized to do business in the State of Arkansas.

Your petitioner, The Burke Construction Company, desires to remove this cause to the United States District Court, Western District of Arkansas, Texarkana Division, before the trial thereof, as it is entitled to do by the laws of the United States. Your petitioner alleges that as between the plaintiffs in this cause, and the defendant, The Burke Construction Company, there is a separable controversy, and said controversy can be wholly determined as between the plaintiffs and said Burke Construction Company, and said separate controversy is the real controversy in this cause.

Your petitioner alleges that The Burke Construction Company, your petitioner, entered into a contract between the Board of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and your petitioner, for the construction of the work of paving as set forth in the complaint in this action. Your petitioner is not insolvent, and under the allegations of the complaint herein, and under the allegations of this petition, there exists first solely a contract between your petitioner and the plaintiff herein. The Burke Construction Company obligated itself, as set forth in said contract, and the plaintiff obligated itself as set forth in said contract, and there is no liability upon the other defendants in this cause, until it is finally determined that there is a liability against The

Burke Construction Company, or a right of recovery in favor of The Burke Construction Company. The plaintiffs allege a failure on the part of The Burke Construction Company to perform the contract set forth in the complaint, and The Burke Construction Company alleges a complete performance of said contract, and the controversy is therefore a separable one between the plaintiff and the defendant, The Burke Construction Company. Your petitioner therefore alleges that it is entitled to remove this cause to the United States District Court for the Western District of Arkansas, Texarkana Division, and before the trial therefore.

Your petitioner has served the notice required by the law of the United States, entitling it to remove this cause to said court.

Your petitioner presents herewith a good and sufficient bond, and prays the court to remove this cause, and to proceed no further
149 herein, except to approve the bond and order the removal, and order transcript of the proceedings herein to be sent to the United States District Court.

II.

For further ground of removal your petitioner alleges that on the 16th day of February, 1920, your petitioner brought in the United States District Court for the Western District of Arkansas, Texarkana Division thereof, a suit at law, on the very contract set forth in the complaint herein. In said suit brought by your petitioner, your petitioner prays for judgment against the plaintiffs in this cause in a sum in excess of One Hundred Thousand Dollars ($100,000.00), involving the very controversy set forth in the complaint herein. That controversy is a controversy solely and alone between your petitioner and the plaintiffs herein. Your petitioner alleges that the plaintiffs in this action, for the sole purpose of denying to your petitioner the rights to try this cause in the United States District Court as it is entitled to do under the Judiciary Act of the United States, has brought this suit in the Chancery Court of Miller County, State of Arkansas, for the sole purpose of endeavoring to deprive the said United States District Court of its jurisdiction in the cause wherein your petitioner is plaintiff and the plaintiffs herein are defendants.

Your petitioner alleges therefore, that under the law of the United States, a Federal question arises and that Federal question appears upon the face of the complaint herein, because it is alleged in the complaint herein that your petitioner has brought said suit in said United States District Court.

Your petitioner further alleges that there is but one controversy in this action, and that is whether the plaintiff in this action has broken said contract, or whether your petitioner has broken said contract, and if the former then the additional question as to the amount of damage that your petitioner is entitled to recover against the plaintiffs in this action. Your petitioner alleges that, exercising the right granted to it under the Judiciary Act of the United States and that Act of Congress giving it the right to remove cause

to the United States District Court, it has brought said suit in the United States District Court.

Your petitioner therefore alleges that a Federal question arises as whether this court has the right to proceed in this cause, or as to whether the petitioner herein has a right to remove this cause to said United States District Court, the same controversy already having been involved, and being set forth in the suit brought by your
150 petitioner against the plaintiffs in this action in said United State Court, as above alleged.

Your petitioner on this ground of removal, alleges and sets forth all the facts set forth in the first count of removal, and alleges the citizenship of the parties to be as set forth in said first count, and makes said first ground a part of this petition for removal.

Your petitioner alleges that under the Act of Congress authorizing citizens of other states to bring suits in Federal Courts, your petitioner had the right to bring said suit in the United States District Court, as above alleged and under a proper construction of said Act of Congress, the plaintiffs in this action have no right, power or authority to bring this action and deprive your petitioner of the right to maintain its suit in said United States District Court, a right granted to it by said Act of Congress known as the Judiciary Act, and that part of said Act authorizing the bringing of suit in the United States District Court by non-residents of a state.

Your petitioner therefore alleges that a Federal question is involved under a proper construction of said Act of Congress, as to whether the plaintiffs in this action may deprive the United States District Court above referred to of its jurisdiction of the cause therein already brought by this petition, your petitioner alleging, that the plaintiffs have no such right to deprive said defendant, your petitioner, of its right to have said cause tried in said United States District Court, and deprive said United States Court of its jurisdiction.

Your petitioner alleges that your petitioner is a corporation organized under the laws of the State of Missouri, and is a citizen and resident of said State of Missouri, under the law, and is entitled to remove this cause for the reasons above set forth, and herewith tenders a good and sufficient bond, having given the notice required by the law, entitling it to remove this cause.

Your petitioner therefore prays that this court proceed no further herein, except to make the order of removal removing this entire cause, as required by law to accept the bond herewith presented, and direct a transcript of the record herein to be made for the court, as provided by law, as in duty bound your petitioner will ever pray.

THE BURKE CONSTRUCTION COMPANY,
By JAS. D. HEAD &
JAMES B. McDONOUGH,
Its Attorneys.

151 *Affidavit.*

STATE OF ARKANSAS,
County of Sebastian, ss:

I, M. C. Burke, on oath states that I am President of The Burke Construction Company, and that the matters and things set forth in the above and foregoing petition for removal are true to the best of my knowledge and belief.

M. C. BURKE.

Subscribed and sworn to before me this 7 day of April, 1920.

[SEAL.] E. H. McCULLOCH,
Notary Public.

My commission expires Nov. 25/1922.

(*Bond on Removal in Case No.* 692.)

Know all men by these presents:

That we the Burke Construction Company, as principal, and I. H. Nakdimen, as surety, are held firmly bound unto John P. Kline, Milton Winham, and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, in the penal sum of Five Hundred Dollars ($500.00), for the payment whereof, well and truly to be made unto the said John P. Kline, Milton Winham and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, their successors, representatives and assigns, we bind ourselves, our representatives and assigns, jointly and firmly by these presents:

Upon condition nevertheless, that whereas the said The Burke Construction Company has filed its petition in the Chancery Court of Miller County, in the State of Arkansas, for the removal of a certain cause therein pending, wherein the said John P. Kline, Milton Winham and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, are plaintiffs, and The Burke Construction Company and M. C. Burke and J. A. Burke and the United States Fidelity & Guaranty Company of Baltimore, Maryland, are defendants to the District Court of the United States, for the Western District of Arkansas, Fort Smith Division.

152 Now, if the said The Burke Construction Company shall enter in the said District Court of the United States within the time required by law, a copy of the record in the said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, we The Burke Construction Company, and I. H. Nakdimen, have hereunto set our hands and seals, this 8th day of April, 1920.

[SEAL.]

THE BURKE CONSTRUCTION COMPANY,
By M. C. BURKE,
Pres.
I. H. NAKDIMEN.

Filed this April 9th, 1920.

J. T. DAVIS,
Clerk.

(*Order of Removal in Case No.* 692.)

This day this cause coming on to be heard by the Honorable James D. Shaver, Chancellor, upon the petition of Burke Construction Company for removal, filed in this cause on the ninth day of April, 1920, comes the petitioner, the Burke Construction Company by James D. Head, its attorney, and come also the plaintiff by its attorneys, W. H. Arnold and Frank S. Quinn, in resistance to said petition, and this cause is thereupon submitted to the court upon the petition and bond for removal filed herein by said Burke Construction Company, and having heard the same the court being duly advised as to the law doth find that the said petition and bond are in all things in due form; that the bond is sufficient, and that the cause should be removed to the District Court of the United States for the Western District of Arkansas, Texarkana Division.

It is therefore, considered, ordered and adjudged by the court that the petition and bond for removal in this cause be, and the same are in all things approved, and that this cause be and the same is hereby removed from this court to the District Court of the United States for the Western District of Arkansas, Texarkana Division, and to that end that the clerk of this court is ordered and directed forthwith to make up a certified copy of all the pleadings, process and papers, including the petition and bond for removal, duly certified
153 under his hand and the seal of this court to the end that the same may be deposited with the District Court of the United States for the Western District of Arkansas, to which order and judgment of the court, plaintiff at the time excepted and asked that its exceptions be noted of record, which is here done.

No. 692.

JOHN P. KLINE et al.

vs.

BURKE CONSTRUCTION COMPANY et al.

Cost Bill.

Clerk's cost	$10.05
Sheriff's cost	4.00
Transcript	12.00
Indexing Transcript	.50
Total	$26.55

Received of Burke Construction Company 12.50 being amount of fees above shown for making transcript on removal and indexing same.

MRS. J. T. DAVIS.

(Clerk's Certificate to Transcript from Chancery Court of Miller County, Arkansas.)

STATE OF ARKANSAS,
County of Miller:

I, J. T. Davis, Clerk of the Chancery Court in and for Miller County, Arkansas, do hereby certify that the annexed and foregoing typewritten pages numbered from 1 to 41, inclusive, contain a true, perfect and compared copy of all pleadings and papers on file and of record in this cause, together with all record entries therein, save and except Exhibit "A" to the complaint and that the printed Proposal Form, Contract and Specifications for Street Improvements hereunto attached and marked Exhibit "A," is a true copy of the Exhibit A to the original complaint filed in Miller Chancery Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court on this 29th day of April, 1920.

J. T. DAVIS,
Clerk.

[Seal of Court.]

43 Equity. Filed May 1, 1920. Wm. S. Wellshear, Clerk, by E. E. Hudspeth, Deputy Clerk.

154 *(Order, May 14, 1920, of the District Court of Arkansas, in the Case of John P. Kline et al., as the Board of Improvement, etc., vs. Burke Construction Company et al., Remanding Cause to the State Court.)*

No. 43. Equity.

JOHN P. KLINE, MILTON WINHAM, and PAUL G. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, Plaintiffs,

vs.

THE BURKE CONSTRUCTION COMPANY, and M. C. BURKE, J. A. Burke, and the United States Fidelity & Guaranty Company of Baltimore, Md., Defendants.

This May 14, 1920, the plaintiffs appearing by W. H. Arnold and Frank S. Quinn, their solicitors, and the defendants appearing by J. D. Head, their solicitor, comes on for consideration the plaintiffs' motion to remand in the above entitled cause. Said motion having heretofore been argued and submitted, the Court now being well and sufficiently advised in the premises doth sustain the same, and it is by the court considered, ordered, adjudged and decreed that this cause be and is hereby remanded to the Chancery Court of Miller County, Arkansas, whence it was removed.

To the action of the Court in sustaining said motion and remanding the cause, the defendant duly excepted at the time.

FRANK A. YOUMANS,
Judge.

* * * * * * *

(Here follows copy of Order of Removal in case No. 692, which is omitted at this point to avoid duplication the same appearing at marginal page 212 of this printed record.)

(Record Entry of the Filing of Order of the U. S. District Court Remanding Cause, in Case No. 692.)

Miller County Circuit Court Record-Chancery, March Term, April 19th, 1920.

#692.

ROAD IMPROVEMENT DISTRICT No. 20
vs.
BURKE CONSTRUCTION Co. et al.

Mandate Federal — Remanding Cause Filed.

Now on this day comes the plaintiff hereto by attorney and suggests to the court of the filing of the mandate from the Federal Court on May 17, 1920.

155 (*Order, May* 25, 1920, *Overruling Motion to Require Plaintiff to Set Out in Separate Counts the Alleged Various Causes of Action, in Case No.* 692.)

This day this cause coming on to be heard on motion of defendants, Burke Construction Company and M. C. Burke, to require the plaintiffs to set out in separate counts the alleged various causes of action set out in said motion; also the motion of defendant, United States Fidelity and Guaranty Co. to like effect, that company being permitted to adopt said motion of the other defendants; the same being submitted to the court, the court is of the opinion that said motion is now well taken.

It is, therefore, considered, ordered, and adjudged by the court that the motion of defendants, Burke Construction — M. C. Burke, and United States Fidelity and Guaranty Company to require plaintiff to set out in separate counts etc., be and the same is hereby overruled, to which action of the court each and all said defendants excepted.

(*Order, June* 2, 1920, *Overruling Motion to Make Complaint More Certain, in Case No.* 692.)

Now on this day comes the defendant hereto by attorney and files herein a motion to strike, and also on the same day he files herein a motion to make complaint more certain, the court after being well and sufficiently advised in the premises is of opinion that the motion should be and the same is hereby overruled, to which order and ruling of the court the defendant at the time excepts.

(*Demurrer to Complaint Sustained in Part and Overruled in Part, June* 17, 1920, *in Case No.* 692.)

692.

JOHN P. KLINE, MILTON WINHAM, and PAUL G. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas,

VS.

THE BURKE CONSTRUCTION COMPANY et al.

This day this cause coming on to be heard on the demurrer of defendants, the Burke Construction Company, M. C. Burke and J. A. Burke and thereupon the United States Fidelity & Guaranty Company appears and asks leave to adopt said demurrer as its own which is granted, thereupon the demurrer being submitted to the court, the court having heard the same is of the opinion that
156 the demurrer should be overruled, save and except as to paragraph 12 of the demurrer, which is propounded to paragraph 14 of the complaint as to which only the court is of the opinion same should be sustained.

It is therefore considered, ordered and adjudged by the court that the said demurrer be sustained as to paragraph 14 of the complaint, to which action of the court, in so overruling each and every one of said paragraphs of the demurrer, the defendants and each of them separately excepted.

(Order August 31, 1920, that the Parties Proceed with the Taking of Depositions, etc., in Case No. 692.)

#692.

BOARD OF IMPROVEMENT OF IMPROVEMENT DISTRICT OF TEXARKANA, ARKANSAS,

VS.

BURKE CONSTRUCTION COMPANY, J. A. BURKE, M. C. BURKE and UNITED STATES FIDELITY AND GUARANTY CO.

Now on this 31 day of Aug. 1920 being an adjourned day of the Chancery Court of Miller County, Arkansas, the court being now in session the Hon. J. D. Shaver, Chancellor, presiding come the parties to this cause, come the plaintiffs by their attorneys F. S. Quinn and W. H. Arnold and the Burke Construction Company, J. A. Burke and M. C. Burke by their attorneys, J. D. Head and the United States Fidelity & Guaranty Co. by their attorney, T. E. Webber and it is ordered by the court that the parties proceed with the taking of depositions herein and the court orders that said depositions be taken in short hand in open court by Guy H. Lambeth, Notary Public, and that he transcribe and file the same herein to be used as evidence in the trial of this case.

(Clerk's Certificate to Proceedings in the Chancery Court of Miller County, Arkansas.)

STATE OF ARKANSAS,
County of Miller:

I, J. T. Davis, Clerk of the Chancery Court of the State and County aforesaid, do hereby certify that the above and foregoing pages contain a true, correct and compared copy of all the record entries in the case of Board of Improvement of Improvement District No. 20 et al. vs. Burke Construction Company et al. case being No. 692 as they appear of record in the Chancery Court Record of Miller County, Arkansas.

157 In Testimony Whereof, I have hereunto set my hand and seal this 3rd day of September, 1920.

(Seal of Court.)

J. T. DAVIS,
Clerk.

(Joint Demurrer of M. C. Burke et al. to the Complaint in Case No. 692.)

Comes the Burke Construction Company, M. C. Burke and J. A. Burke, and without waiving any of their motions heretofore filed, demur to the complaint of the plaintiffs herein, and for cause say:

1. There is a misjoinder in one and the same count of two or more causes of action.

2. There is a misjoinder in one and the same count of causes of action and of parties defendant.

3. There is a misjoinder in one and the same count of parties defendant to separate causes of action.

4. The complaint fails to state facts sufficient to constitute a cause of action against the defendants or either of them.

5. The complaint fails to state a cause of action against the defendants or either of them which is cognizable in a court of equity.

6. The causes of action, if any, set out in the complaint are not cognizable in a court of equity, but are solely cognizable in a court of law.

7. The complaint states a cause of action purely cognizable at law in so far as a cause of action is stated and under the laws and constitutions of both the State of Arkansas and the United States the defendants and each of them are entitled to a trial thereof by jury.

8. Because his cause of action has been prematurely brought, it appearing from the face of the complaint that the plaintiffs took over the work under Section 16 of the contract between the Burke Construction Company and the District; that they elected to pursue the remedy provided by said Section 16; that from the complaint it appears that the work has not been finished and the funds or retained percentages belonging to the Burke Construction Company have not been exhausted, hence no present cause of action in favor of the plaintiffs as against the defendants or either of them is stated.

158 9. Said defendants demur to paragraph 11 of the complaint for the reason that said paragraph fails to state a cause of action.

10. Defendants demur to paragraph 12 of the complaint for the reason that the same fails to state a cause of action.

11. Defendants demur to paragraph 13 of the complaint because it fails to state a cause of action cognizable in equity.

12. Defendants demur to paragraph 14 of the complaint because it fails to state facts entitling the plaintiff to any relief and fails to state a cause of action.

13. Defendants demur to paragraph 15 of the complaint for the reason that the same fails to state a cause of action and fails to state facts sufficient to entitle the plaintiff to any relief.

Wherefore, premises considered, defendants pray judgment of this, their said demurrer, and each and every paragraph thereof.

JAMES D. HEAD,
JAMES B. McDONOUGH,
Attorneys for above named Defendants.

(*Answer of Burke Construction Company et al. in Case No.* 692.)

Come the defendants, Burke Construction Company, M. C. Burke and J. A. Burke, and for answer to the complaint herein, and that without waiving their demurrer, and without waiving the questions raised in the motions heretofore filed, state as follows:

Plaintiffs herein are not entitled to bring and maintain this suit, and the said suit is prematurely brought, and should be abated, because of the fact that the said Board of Improvement representing Paving District No. 20, elected to act and proceed under Section 16 of the contract, and so acting, took over the property of the Burke Construction Company, being the property described below, and being property of large value. The plaintiffs have ever since retained the custody of said property, and have used the same, and are using same upon the streets of the City of Texarkana. By reason of said election to act under Section 16 of the contract, which said Section 16 is set out in the exhibit to the complaint herein filed,
plaintiffs took possession of all of the property described, and
159 the engineer of the plaintiffs, by and under the direction of
the plaintiffs, placed upon the work such persons as the plaintiffs desired, and as said engineer desired, and proceeded with the work and took possession of all the materials and equipment of the Burke Construction Company, and notified the Burke Construction Company that that company should proceed no further with the work, and that the plaintiffs would complete the work, and the plaintiffs thereupon proceeded to complete the work.

Defendants M. C. Burke and J. A. Burke in that connection also allege that they are not proper parties to this action, and they should be dismissed herefrom, for the reason that there is no liability against them until the question of liability between the plaintiffs and the Burke Construction Company is fully settled and determined.

These defendants further allege that the Burke Construction Company has brought suit in the United States District Court for the Western District of Arkansas, Texarkana Division, to recover of and from the plaintiff, damages for the breach of the contract by the plaintiffs in this action, and said cause is now pending in that court, and the plaintiffs herein have not the right to proceed in this court:—First, because the plaintiffs have elected to proceed under Section 16 of said contract, and second, because of the pendency of the suit of the Burke Construction Company against the plaintiffs herein.

Defendants further state that the Burke Construction Company has not violated its contract, and therefore there can be no liability against M. C. Burke and J. A. Burke and the United States Fidelity & Guaranty Company of Baltimore, Maryland, and therefore M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company of Baltimore, Maryland, are improper parties hereto, and these defendants move the court to strike from the complaint herein, the names of M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company of Baltimore, Maryland.

These defendants further allege that the plaintiffs have taken over equipment, materials and machinery belonging to the Burke Construction Company, and have not returned said property to the Burke Construction Company. Said property was taken over as alleged under Section 16, and therefore the plaintiffs are not entitled to ask and demand damages of these defendants. The plaintiffs are therefore not in a position to sue for damages or for an accounting against M. C. Burke or J. A. Burke, or the United States Fidelity &
160 Guaranty Company of Baltimore, Maryland. As against these parties who are the sureties on the bond of the Burke Construction Company, the plaintiffs have no cause of action until plaintiffs have finished the work proceeding under Section 16, as they have already commenced. Defendants therefore again move the court to dismiss this cause, as against M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company of Baltimore, Maryland, who are the sureties on the bond, as the plaintiffs have no cause of action against said sureties.

II.

Further answering, these defendants say and allege that a court of Chancery has no jurisdiction of the matters set forth in the complaint herein. The matters set forth in the complaint are matters belonging to a court of law solely, and are cognizable solely in a court of law, and these defendants therefore move the court to transfer this cause to the Circuit Court of Miller County, and that this court proceed no further herein. Under the Constitution of the State of Arkansas, the defendants herein are entitled to a jury trial in a court of law. For the purpose of showing that the cause herein is one cognizable solely in a court of law, the defendants refer to the complaint and make the same a part of the answer herein. Defendants therefore move the court to transfer this cause to the said Circuit Court above named.

III.

These defendants admit that the contract referred to in complaint as exhibit "A", and which was made a part of the complaint, is the contract, if correctly copied, entered into between the Board of Improvement of Paving Improvement District No. 20 and the Burke Construction Company. These defendants deny that the Burke Construction Company failed to complete the work referred to in the

contract within the time specified, and allege, but for the wrongful acts and conduct of the plaintiffs and their engineer, said work would have been completed before the time fixed in the contract for the completion of the same. By reason of the wrongful acts and conduct of the plaintiffs, and their engineer, it became necessary to extend the time for the completion of said work, which extension was had by agreement between the parties in writing. The defendant, however, Burke Construction Company, did not waive the breaches of said contract which were made by plaintiffs, prior to the extension. The Burke Construction Company executed and
161 delivered to the plaintiffs, its bond dated 29th day of November, 1916, but under the terms of that bond, the plaintiffs have no cause of action whatever against M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company until after the said work is completed, and further have no cause of action, and can have no cause of action against M. C. Burke and J. A. Burke and the United States Fidelity & Guaranty Company, because the plaintiffs permitted the first breach of said contract, and wholly breached said contract, and thereby relieved the Burke Construction Company from a performance of said contract.

These defendants deny that the plaintiffs, during the life of said contract, complied on their part with said contract; deny that the plaintiffs duly made payments to the defendant under the said contract, and allege that the plaintiffs broke said contract, and relieved the defendant, Burke Construction — from any performance thereof, because of the failure of the plaintiffs to make the payments required under the terms of said contract. Defendants deny that the plaintiffs, after the expiration of said contract, stood ready to renew the contract for another year, upon the terms which seemed to the Board to be reasonable. No agreement for extension was made, because the plaintiffs broke the contract, as herein alleged. These defendants deny that the Burke Construction Company, on or about the first day of December, 1919, quit the work, and abandoned the same, and allege that the contract was first broken by the plaintiffs, and that the plaintiffs refused to carry out said contract with the defendant, the Burke Construction Company, and that after said contract was broken by the plaintiffs, the Burke Construction Company ceased work upon said paving, because said contract had been previously broken by the plaintiffs herein.

These defendants deny that the Burke Construction Company shipped away asphalt and removed teams and discharged employees for any reason other than that the plaintiffs herein had broken said contract, and refused to permit the Burke Construction Company to proceed with the construction of said pavements.

Further answering, the defendants state that the plaintiffs broke said contract by failing to make the payments required under the same, and in addition thereto, broke said contract by taking over property under Section 16, and without just right proceeded with the construction of the pavements, and the plaintiffs notified the Burke Construction Company to get off of the works, and to do noth-
162 ing more toward the construction of the pavements. The Burke Construction Company alleges that it ceased work upon

the said streets because the plaintiffs warned it not to work any further, and because plaintiffs had breached the contract by violating the same, by failing to make the payments, as required, and by illegally and unlawfully interfering with the construction of said work, and by causing its engineer to make unreasonable, wanton, arbitrary and unjust demands upon the Burke Construction Company. These defendants deny that the plaintiffs complied with the terms of the contract, and specifically in taking charge of the property of the defendant, the Burke Construction Company, and in proceeding with said work. Pretending to proceed under the terms of Section 16 of said contract, the plaintiffs unlawfully seized, took over and converted to their own use, the materials, machinery, equipment and other property belonging to the Burke Construction Company, which it had been using in the construction of said street improvements. These defendants deny that the plaintiffs, under the terms of the contract were authorized to take over the property belonging to the Burke Construction Company; and deny that the plaintiffs were authorized to hold said property; and deny that the list of property attached to the complaint herein is a correct list of the property taken over by the plaintiffs from the Burke Construction Company. These defendants deny that the plaintiffs withheld from the Burke Construction Company the retained percentages on account of the fact that said work had not been completed; and deny that said percentages were retained because of any breach of the contract on the part of the Burke Construction Company; and deny that under the terms of the contract and specifications, the plaintiffs had any right to withhold payment of estimates, and allege that the plaintiffs wrongfully withheld said retained percentages, and thereby broke said contract, and by reason thereof, the plaintiffs have no cause of action whatever, and the defendant, Burke Construction Company is not in any way liable to the plaintiffs, and by reason of the unlawful and wrongful action of the plaintiffs in taking over said property, the plaintiffs have no right to bring and maintain this suit against M. C. Burke or J. A. Burke or the United States Fidelity & Guaranty Company of Maryland.

Further answering, these defendants deny that it was the intention and purpose of the plaintiffs to take over said property of the defendant, Burke Construction Company, and to take over the contract and the work, and to complete the paving insofar as the
163 funds on hand would permit; deny that said property and works were taken over under the terms and conditions of Section 16 of said specifications, and defendants deny that the funds on hand were exhausted; and deny that it has any right to call upon the Burke Construction Company or its bondsmen for sufficient amount to complete and finish the contract.

These defendants deny that the carrying out of said contract, in accordance with the terms of Section 16, has not been rendered impractical and has not been rendered impossible. These defendants concede that the Burke Construction Company has brought its suit in the United States District Court, Western District of Arkansas, Texarkana Division, demanding a large sum because of the breach

of the contract between plaintiffs and defendants, which breach was committed by the plaintiffs, and the defendants allege that the Burke Construction Company is entitled to recover the damages therein prayed for, and that suit was brought before this suit was brought, and the defendants allege that this suit was brought for the sole purpose of hindering and interfering with the jurisdiction of the said United States District Court to hear and determine that cause. The defendants allege that all the controversies and questions growing out of the contract under consideration are involved in the case in the Federal Court, and the determination of that case upon its merits will settle all of the controversies raised by the plaintiffs in this suit. The defendants therefore allege that this suit is brought merely for the purpose of [harrassing] and delaying the defendant, the Burke Construction Company in the *property* prosecution of its cause in the United States District Court, and therefore the plaintiffs herein are not entitled to bring and maintain this suit in this court.

This is a court of equity, and courts of equity do not favor bringing of suits in courts of equity, simply to interfere with the proper prosecution of the same questions in courts of law, and courts of equity do not entertain jurisdiction of alleged causes of action which are brought merely for the purpose of [harrassing] the plaintiffs in a suit at law, and of delaying the proper prosecution of said suit at law.

Further answering, these defendants deny that the bringing of the suit in the United States District Court renders hazardous the expenditures of the funds of the District by the plaintiffs, and the bringing of said suit in the United States District Court is solely for the purpose of settling the controversies and the rights of the parties, growing out of said contract, and the bringing and prosecu-
164 tion of said suit does not in any way interfere with the rights of the plaintiffs herein, to proceed with the construction of said property, if they have any such rights. These defendants allege that the plaintiffs did not have the right to take said work away from the defendant, Burke Construction Company, because the plaintiffs had violated said contract, and had no right to deprive the Burke Construction Company of its property.

These defendants deny that the Burke Construction Company abandoned its work, and its contract; and deny that its conduct in bringing its suit for damages evinces an intention and purpose upon the part of these defendants to abrogate the contract, and on the other hand, allege that the bringing of said suit evinces a purpose to compel the plaintiffs to comply with the terms of said contract, and to respond in damages to the defendant, Burke Construction Company, for a breach of said contract.

These defendants deny that the action of the Burke Construction Company in bringing said suit in the United States District Court entitles the plaintiffs to an accounting for the value and amount of work done under such contract; and deny that the plaintiffs have any right for an accounting, and allege that there is nothing in the cause but a question of the breaking of the contract by the plaintiffs; and deny that the plaintiffs have in good faith brought their suit for an accounting; and deny that the facts set forth in the complaint

herein entitle plaintiffs to any accounting, and allege that the bringing of the suit by the Burke Construction Company in the United States District Court will raise and settle all controversies growing out of said contract. Defendants deny that by reason of the bringing of said suit plaintiffs herein are entitled to bring and maintain a suit against the Burke Construction Company and its bondsmen, and on the contrary, allege that the bringing of said suit makes the bringing of any suit against the bondsmen premature and wrongful.

These defendants deny that plaintiffs have on hand only the sum of Sixty Thousad Dollars ($60,000.00), balance of proceeds of sale of an issue of bonds amounting to One Hundred and Fifty Thousand Dollars ($150,000.00). These defendants deny that the balance on hand of the bond issue and the retained percentages constitute the only assets of the plaintiffs; and deny that the sum of Seventy Seven Thousand Dollars ($77,000.00) constitutes the only available fund in the hands of the plaintiffs to finish and complete the im-
165 provements and paving called for by said contract. Defendants deny that the plaintiffs are entitled to any accounting; and deny that upon an accounting it will be shown that Eighty Thousand Dollars ($80,000.00) additional will be required to construct and complete the work.

Further answering, the defendants deny that the plaintiffs in good faith invoke the jurisdiction of this court, because this cause involves numerous and complicated accounts; and deny that the cause does involve numerous and complicated accounts; and allege that all questions and all controversies which are attempted to be brought into this court in this complaint will be determined [—] finally settled in case of Burke Construction Company against Board of Improvements, Paving District No. 20, above referred to.

These defendants deny that plaintiffs heretofore have contended that all has been paid the Burke Construction Company except the retained percentages and the amount of work for November, 1919. These defendants allege that the plaintiffs breached said contract not only by failing to pay the amount due the defendants, but also by failing to pay the amount due for the month of November, 1919, and for other months. Defendants allege that the questions raised in said contract, and growing up out of said contract are all questions of law, and cognizable only in court of law.

Further answering, these defendants deny that there is a conflict between the theories of the plaintiffs and the Burke Construction Company, with reference to the kind and character of work and as to the material to be used, which the contract calls for. The defendants deny that there is any conflict between the plaintiffs and the defendants, except as to the breach of the contract and the amount due to defendant, Burke Construction Company, from plaintiffs for the breach of said contract. The defendants allege that the plaintiffs are not entitled to proceed with this suit because of the pendency of the other suit, and the defendant, Burke Construction Company, therefore does not set out in this answer the relief to which it is entitled in the suit brought by the Burke Construction Company against Plaintiffs, which said suit was brought

in the United States District Court for the Western District of Arkansas, Texarkana Division. These defendants deny that any accounting is required between the plaintiffs and the defendants in any way whatever on any matter relating to said contract.

166 Further answering, these defendants deny that the United States Fidelity & Guaranty Company is the holder and in possession of any securities given to it by the Burke Construction Company, and by M. C. Burke and J. A. Burke, to indemnify the United States Fidelity & Guaranty Company from loss upon its signature upon the bond of the Burke Construction Company. These defendants deny that plaintiffs are entitled to any discovery as to any securities claimed to be held by the United States Fidelity & Guaranty Company, to secure that company, by reason of that company being upon the bond of the Burke Construction Company.

Defendants deny that the plaintiffs are entitled to any accounting or any judgment or decree of any nature whatever, against either of the defendants or against the United States Fidelity & Guaranty Company of Baltimore, Maryland, and deny that the plaintiffs are entitled to any accounting, and allege that the Burke Construction Company is entitled to recover against the plaintiffs herein, the damages sued for in the United States District Court. The Burke Construction Company has brought suit in good faith for said damages in the United States District Court, and that cause is now pending in that court, and that cause was brought before this suit was brought, and every question involved in this case will be settled by the trial of that case.

Premises Considered, the defendants pray that this suit be dismissed at the cost of the plaintiffs.

JAMES D. HEAD,
JAMES B. McDONOUGH,
Attorneys for Defendants.

(*Answer of the United States Fidelity and Guaranty Company, in Case No.* 692.)

Comes the defendant, The United States Fidelity & Guaranty Company of Baltimore, Maryland, and without waiving its demurrer and the several questions heretofore raised in the different motions filed, for answer to the complaint herein states:

It admits that on the 29th day of November, 1916, the plaintiff and the defendant, The Burke Construction Company, entered into a certain contract whereby the named defendant agreed to put in, construct and complete certain street improvements and paving in Paving Improvement District No. 20 of the City of Texarkana, Arkansas, at and for a unit price for every class of work to be

167 done under said contract in the district.

Defendant admits that the plaintiff granted The Burke Construction Company two extensions of time for the completion of said work, but alleges that the said Burke Construction Company did not, by entering into said extension agreements, waive any rights

which had accrued to it prior to the execution of said agreement, reason of the breaches of the contract made by this plaintiff. admits that on the 29th day of November, 1916, The Burke Co struction Company executed and delivered to the plaintiff a bond the sum of Three Hundred Thousand ($300,000) Dollars, and th this defendant was and is one of the sureties thereon, [*but this d fendant was and is one of the sureties thereon*], but this defenda alleges that the plaintiff has no cause of action against it until aft the said work provided for in the contract is fully completed; a furthermore that the plaintiff has no cause of action against it un the question of liability between the plaintiff and The Burke Co struction Company has been finally settled and determined.

Further answering defendant states that the plaintiff is not entitl to bring or maintain this suit for the reason that same is premature brought, and that the plaintiff can have no cause of action again this defendant, or any of the bondsmen, until after all of said wo provided for under the contract is fully completed.

Defendant states that the plaintiff, proceeding under Section of the said contract, notified the Burke Construction Company th the contract was ended and prohibited the said construction compa from further prosecution of any work. At the same time plaint notified the said construction company that in accordance with Se tion 16, it would take possession of all of said construction compan materials and equipment in the City of Texarkana, Arkansas, ta over the work under the contract, and would proceed to complete t same. Defendant alleges that in fact the said plaintiff did take ov materials and equipment of the value of Twenty Thousand ($2 000) Dollars belonging to the said Burke Construction Compan took over said work and proceeded to begin to complete the same using said materials and property of The Burke Construction Co pany in working upon the streets in said District No. 20.

Defendant alleges that by reason of plaintiff's voluntary electi to proceed under Section 16 of the contract it should be bou
168 by said election and is not now entitled to bring or maintai this suit until after the contract is completed, for the reas that said Section 16 specifically controls, and that plaintiff, by ele ing to proceed under said section, cannot now renounce and repudia its election and decision, but in accordance with the terms of sa section is compelled to finish said work before calling upon the Co tractor or the Bondsmen for damages.

Defendant further states that a Court of Chancery has no jurisdi tion of the matters set forth in this complaint, but that they mak out a case solely cognizable in a Court of Law, and therefore this de fendant moves the Court to transfer this case to the Circuit Court Miller County in order that this defendant may have the right an privilege of a trial by jury.

This defendant denies that during the period of time covered b the said original contract and the two extension agreements herei before referred to, that the plaintiff complied with its part of sa contract and duly made payments to the said defendant for th work done, but alleges that the said plaintiff wrongfully, illegal

and in violation of the terms of the contract withheld payments from the said Burke Construction Company. It denies that at the expiration of the second extension agreement the plaintiff stood ready to renew the contract for another year, and it denies that at the expiration of the second extension agreement that not more than one-half of the work was completed. It denies that on or about the first day of December, 1919, The Burke Construction Company quit the said work and abandoned the same, and discharged its employees and removed teams, asphalt and other paving materials from the City of Texarkana, Arkansas, and it denies that on December 16, 1919, the said Burke Construction Company notified the plantiff that unless the plaintiff discharged its Engineer the defendant would not return to and resume work in the district. The defendant denies that on January 19, 1920, the plaintiff notified The Burke Construction Company and the Bondsmen to resume work in the district in pursuance of Section 16 of said contract, but alleges that on or about that date the plaintiff took over the said work and all of the materials, machinery and equipment along the line of work belonging to The Burke Construction Company for the expressed purpose and with the intention of completing said work, as this defendant insists and alleges that the plaintiff was bound to do under the provisions of said Section 16 of the contract, under which the plaintiff was claiming to proceed, and this defendant avers that inasmuch as the plain-
169 tiff elected to proceed under Section 16, took over the property of the said construction company, notified it that said contract was terminated and that the plaintiff would proceed to complete the said work provided for under the contract, that said plaintiff is now estopped from prosecuting this suit and has no cause of action against defendant under said contract and bond until after the plaintiff has finally completed the work to be done under said contract.

Defendant denies that the list of property attached to the complaint, purporting to be a list of property taken from the Burke Construction Company, is correct. Defendant denies that on November 1, 1919, plaintiff had in its hands the sum of $13,752.45 representing retained percentages held by the plaintiff for work done by it under the contract, but alleges that the plaintiff has in its hands belonging to the said Burke Construction Company as retained percentages for work done a much larger sum of money. Defendant admits that plaintiff now has in its hands a considerable sum of money due for work done by the said construction company during November and December, 1919, after the expiration of the second extension agreement, but denies that said plaintiff has the right and authority to withhold payment thereof, and denies that the said Burke Construction Company was not proceeding with its work in satisfactory and workmanlike manner.

Defendant denies that it was the intention and purpose of the plaintiff to take over the said work and property of the Burke Construction Company, complete the work in so far as the funds in its hands would permit under the terms and conditions of Section 16 of said contract, and that when the funds on hand were exhausted,

to call upon The Burke Construction Company and its bondsmen to complete said work, but alleges that the true intent and purpose in such action was to prosecute the said work to completion; and this defendant alleges that the legal effect of the plaintiff's action in electing to proceed under said section, and in seizing the property of said construction company, is to operate as an estoppel and prevents the plaintiff from maintaining this action until after all of the work contemplated by the contract is completed.

It denies that carrying out said contract in accordance with the terms of Section 16 has been [render-] Impracticable, if not impossible, because the Burke Construction Company has brought suit in the United States Federal Court for a large sum of money
170 against this plaintiff. The defendant denies that the failure of the Burke Construction Company to complete said contract, and its abandonment of work and its act in bringing suit against said Board in the United States Federal Court evinces an intention and purpose upon its part to abrogate and renounce the said contract, and denies that any course of conduct or act upon the part of the said Burke Construction Company amount to a renunciation or abrogation of said contract, but states that long before said suit was filed by The Burke Construction Company this plaintiff had notified the said construction company in writing that the contract was terminated, and had proceeded to take possession of all of the property belonging to said company along the line of work.

It denies that the plaintiff is entitled to an accounting for the value and amount of work done under such contract, because this defendant states that the plaintiff is already in possession of all the facts, figures and estimates covering the value and amount of each and every item of work done under said contract, and defendant further denies that plaintiff is entitled to an accounting for the value and amount of work yet to be done, but states that if any work is yet to be done under the contract, its value and amount is merely a matter of mathematical calculation and does not necessitate an accounting.

Defendant denies that the plaintiff now has in its hands aside from the amount due on retained percentages and for work done by the Burke Construction Company the sum of Sixty Thousand ($60,000) Dollars, and denies that the total amount of money in plaintiff's hands, including the retained percentages and the amount due for work, amounts to approximately Seventy-seven Thousand ($77,000) Dollars, and denies that said sum of money is all the money available to said plaintiff to complete the work provided for by the contract.

Defendant denies that it will require the additional sum of Eighty Thousand ($80,000) Dollars to finish and complete the work called for by the contract.

Defendant denies that the jurisdiction of this court is invoked because this case involves numerous and complicated accounts, but states the truth to be that this suit is filed for the purpose of harassing and delaying The Burke Construction Company in the prosecution of its ase in the United States Federal Court for the Western District of Arkansas, which case raises exactly the same questions,

issues and controversies growing out of said contract under
171 consideration which are sought to be raised by the plaintiff in this case. This defendant alleges that The Burke Construction Company is entitled to recover the damages sued for in its case against the plaintiff in the United States Federal Court, which case was filed long before this suit was brought; and this defendant alleges that this suit was brought with the intention and for the purpose of hindering and interfering with the jurisdiction of the United States District Court for the Western District of Arkansas, and for the reason that plaintiff hoped and anticipated a more favorable consideration and decision from this Court than it would get in the Federal Court.

Defendant denies that there is a conflict in the theories of the plaintiff and The Burke Construction Company with reference to the kind and character of work, and as to the materials to be used under the contract, which involves a statement of accounts upon the part of each party of practically every subject of the contract, but states that the only question in the case is whether or not said contract was breached, and, if so, by whom, and this defendant alleges that the plaintiff was and is guilty of breaching the contract in divers ways. Defendant further states that the contract is made a part of the complaint and speaks for itself, indicating exactly the kind and character of work and materials contemplated, and that therefore whatever theories either party may have about said contract is immaterial and irrelevant.

Defendant further states that the said plaintiff took possession of property belonging to the Burke Construction Company of the approximate value of Twenty Thousand ($20,000.00) Dollars; that said property was held by it from February 9, 1920, to June 19, 1920, when it was voluntarily returned to The Burke Construction Company, and this defendant states that the plaintiff could not surrender said large amount of property after having taken possession of same and having it under control under the terms of the contract, as plaintiff states and alleges in its complaint, it was a violation of the terms and conditions of the bond and contract as to this defendant, and in direct contravention of the rights and privileges of this defendant as a surety, and that by reason of said act of relinquishing control of said property and returning same to the said construction company, this defendant was and is wholly discharged from any liability whatever in this case.

Defendant further states that the plaintiff, during the life of the
172 contract and the two extension agreements, was guilty of material deviations, departures and alterations in the said contract and without this defendant's knowledge or consent; that from the defendant's viewpoint, these changes, alterations and departures were material and increased the risk and hazard as a bondsman and constituted breaches of the contract as far as the sureties on the bond are concerned. The breaches complained of are that the plaintiff and its Engineer compelled extra sweeping on large areas of the gravel base which had been laid in many places in the district, and that after said extra sweeping had been done the

Contractor was compelled to lay approximately double the amount of asphalt called for by the contract to bring the street up to the grade; that this extra amount of asphalt caused the contractor to expend a great amount of money over and above what it should have cost him if the engineer had complied with the specifications, and was wholly unwarranted and increased the cost of said work materially, making it much more expensive than the construction company or its bondsmen could have reasonably anticipated or contemplated; that said Engineer required and compelled the construction company to lay four, five and six courses of gravel on all streets worked upon by said company when the contract provided for but two courses; that this greatly increased the cost of laying the gravel base over and above what it would have been had the Engineer complied with the specifications, and constituted a material deviation from the terms of the contract.

Defendant further states that after the contract was signed the plaintiff made certain changes and alterations in the specifications without the consent and knowledge of this defendant, in that in some places asphalt was substituted for the brick surface, and vice versa, and many of the streets were paved with a material different from that specified in the contract for those particular streets at an increased cost and expense to the construction company.

Defendant further states that the plaintiff allowed and authorized the defendant construction company to perform a great amount of work in the months of November and December, 1919, and refused, failed and neglected, and still refuses, fails and neglects to pay to the said construction company the amount of the engineer's estimate of said work, although said money was due the construction company on the first Monday following the end of the month in which the work was done. Defendant alleges that by reason of the above breaches of said contract on the part of plaintiff and its engineer that it is wholly discharged from any liability under this contract and bond.

173 Defendant also states that by reason of the wrongful, illegal, wanton and arbitrary demands and requirements of the engineer for the district that the said construction company was so [harrassed], hampered and delayed that it could not complete the contract in the time specified, and that furthermore said actions of the engineer compelled the Burke Construction — what the work would have cost if they had been allowed by the engineer to proceed according to the terms and provisions of the specifications and contract; that such actions, demands and requirements of the engineer were contrary to the terms of the contract, unjust, unreasonable, unnecessary and inequitable, greatly increased the hazard and risk assumed by this defendant as a bondsman, and were beyond the contemplation or comprehension of the defendants; that said engineer rendered it impossible for said construction company to have completed the contract, caused it to lose a large sum of money on the work, and so increased and changed the risk and obligation first assumed by this defendant as to operate as and constitute a release and discharge of any liability under said contract or bond.

Defendant further states that the plaintiff cannot now bring or maintain this action for the reason that the damages sought by it are purely speculative, theoretical and contemplative; that there is no possible way by which a correct and exact estimate of the work to be done in the future can be arrived at because of the fact that the prices of labor and materials are continually changing from day to day, and no man can tell today what the cost of such work will be tomorrow; that the damages claimed are not certain or fixed, and it would be impossible at this time to make a correct estimate of work to be done at any time in the future, nor is it possible to now estimate or determine what the cost of different materials used in street paving will be at some time in the future; that particularly at the present time, when the economic and industrial condition of this country is so unsettled and there is such general unrest in the labor and industrial world, with the prices of every commodity inflated, prices of goods and demands of labor continually changing and fluctuating, it is impossible to determine or fix in advance the cost of performing the work contemplated by said contract; hence defendant [praus] that this case be dismissed, as it is a suit based solely upon speculative damages, too uncertain to be proved by direct and definite testimony, and defendant further states that any judgment rendered on such testimony as will be produced by plaintiff tending to show the cost of completing said work could not be sustained.

174 Defendant further states that The Burke Construction Company on the — day of February, 1920, brought suit in the United States District Court for the Western District of Arkansas, Texarkana Division, to recover of and from this plaintiff the amount of retained percentages held by it, and the amount owing it for work done in November and December, 1919, and for damages for breach of the contract in controversy, and that said case is now pending in that court. The defendant states that because of the pendency of that suit the plaintiff herein has not the right to maintain this action, and this defendant alleges that this case was brought solely for the purpose of hindering and delaying the prosecution of the case filed by The Burke Construction Company, and also for the purpose of interfering with and obstructing the course of the case in the Federal Court, and this defendant alleges that under those circumstances this plaintiff is not entitled to maintain this action on account of the fact that exactly the same questions and issues in every particular are set out in the complaint of the construction company and the answer and counter claim of this plaintiff filed in said Federal Court as are set out in the pleadings of the parties to this action, and therefore the case filed by the construction company wil lsettle every controversy, question and issue growing out of the said contract sued on by the plaintiff in this case.

Wherefore defendant prays that it be dismissed with its costs.

WM. M. HALL AND
WEBBER & WEBBER,
Attorneys for Defendant, United States Fidelity & Guaranty Company of Baltimore, Maryland.

STATE OF ARKANSAS,
County of Miller, ss:

I, J. T. Davis, Clerk of the Circuit Court within and for Miller County, Arkansas, and Ex-officio Clerk of the County and Probate Court of said county ,do hereby certify that the above and foregoing is a true, perfect and correct copy and transcript of amendment to answer of the United States Fidelity & Guaranty Co. in case of John P. Kline et al. vs. Burke Construction Co., et al. now on file and of record in my office.

In testimony whereof I hereunto set my hand and the seal of said Miller Circuit Court, at office in Texarkana, Arkansas, this 6th day of September, A. D. 1920.

[SEAL.]

J. T. DAVIS,
Clerk, Miller Co., Ark.

175 *Amendment to Answer of the United States Fidelity and Guaranty Company, in Case No.* 692.)

Comes the defendant, The United States Fidelity and Guaranty Company and files this its amendment to the answer heretofore filed in this case.

Defendant states that before the execution of the contract sued on herein and at the time of its execution that it was contemplated by all parties and that it was intended and excepted that the Burke Construction Company would use gravel in place as it existed on said streets in the district; that the streets in the district had a good substantial base placed thereon by a former improvement district and the contract specifically provided that the contract- might use said gravel in place; that the chairman of the Board of commissioners advised the Burke Construction Company of this fact and pointed out to it the character of the base then existing and advised the said Construction Company that on many of the streets said base and gravel in place could be used by the said Construction Company; that the contractor took this fact into consideration when submitting his bid and upon entering said contract because of the fact that if he were allowed to use gravel in place that the cost of performing the work set out in the contract would be materially decreased compared to what said cost would be if the street grade were lowered and the defendant forced to do a great amount of work and to expend large sums of money in cutting and lowering the grade on each and every street in said district, that this work was very expensive and caused said contractor to spend large sums of money over and above the amount that was in the mind and contemplation of the parties at the time the contract was executed; defendant states that this was a fact coming to knowledge of the plaintiff after the execution of the contract and that said action of the engineer, concurred in by plaintiff, increased and enlarged the risk and liability of this defendant in that it caused the said Burke Construction Company to spend large

sums of money which were not in the contemplation of the parties and which could not have been foreseen and all of which this defendant had no knowledge or notice; that the lowering of the grade constituted a change in the relation between the plaintiff and the Burke Construction Company, resulting in larger responsibilities upon said Construction Company and this defendant avers that said action discharged and relieved it from liability in this case.

176 Defenedant alleges that by reason of plaintiff returning to the Burke Construction Company the larger amount of material, equipment and property which it took over on February 9, 1920, as heretofore set out in the original answer, that this defendant is discharged from liability, but states that in the event the court should find that said action of the Board did not wholly discharge this defendant that then, in the event a judgment is rendered against this defendant that the value of said returned property should be set off against said judgment and this defendant given credit therefor.

Defendant further states that this plaintiff filed its counterclaim in the suit now pending in the United States Federal Court, which action was in effect a suit by this plaintiff against the Burke Construction Company and this defendant states that this plaintiff should not be allowed to maintain separate actions against the principal and the sureties at the same time and therefore prays that this suit be dismissed.

WM. M. HALL & WEBBER & WEBBER,
Attorneys for Defendant, United States Fidelity & Quaranty Co.

STATE OF ARKANSAS,
County of Miller, ss:

I, J. T. Davis, Clerk of the Circuit Court within and for Miller County, Arkansas, and Ex-Officio Clerk of the County and Probate Court of said county, do hereby certify that the above and foregoing is a true, perfect and correct copy and transcript of the original answer filed by the United States Fidelity & Guaranty Company in case of John P. Kline, et al. as Board of Improvement of Paving Improvement District No. 20 vs. Burke Construction Company, et al., now on file and of record in my office.

In Testimony Whereof I hereunto set my hand and the seal of said Miller Circuit Court, at office in Texarkana, Arkansas, this 6th day of September A. D. 1920.

J. T. DAVIS,
Clerk Circuit Court, Miller County, Ark.

177 (*Petition for and Order Allowing Appeal.*)

Filed in U. S. District Court September 3, 1920.

No. 47. Equity.

BURKE CONSTRUCTION COMPANY, Plaintiff in error,

vs.

JOHN P. KLINE, MILTON WINHAM, and PAUL G. HUCKINS, as the Board of Improvement of Paving Improving District No. 20 of the City of Texarkana, Arkansas, Defendants in error.

To the Honorable Circuit Court of Appeals for the Eighth Circuit of the United States:

Comes now the Burke Construction Company, and represents and states to the court that said Burke Construction Company on the 24th day of August, 1920, filed in this court a bill in equity, as a defendant and supplemental bill, in which bill of complaint said Burke Construction Company alleged among other things that the defendants in said cause, who are the defendants in error herein were proceeding to prosecute a suit in the Chancery Court of Miller County, State of Arkansas involving exactly the same issues as is involved in case 439 pending in the United States District Court on the law side in which latter case the Burke Construction Company, the plaintiff in error and appellant herein is plaintiff and John P. Kline, et al., the defendants herein are defendants.

This appellant further shows that this appellant on the 16th day of February, 1920, brought suit against the appellees and defendants in error herein in the United States District Court, Western District of Arkansas, Texarkana Division, for the sum of $85,250.84. The cause of action set forth in that complaint was based upon a contract between the plaintiff herein and the defendants dated November 29, 1916. In that contract the plaintiff herein undertook to construct certain pavements in Paving District #20 in the city of Texarkana, Miller County, Arkansas. In said suit plaintiff herein alleged that the defendants had breached said contract. The defendants herein appeared in said suit #439 law and answered and filed a counter claim, basing its answer and counter claim upon the contract referred to. On March 19, 1920, the defendants herein filed in the Chancery Court of Miller County, State of Arkansas a bill of complaint against this plaintiff and J. A. Burke, M. C. Burke and the Fidelity & Deposit Company of Maryland, alleging that these three parties were sureties on the bond of this plaintiff for the faithful perform-
178 ance of the contract in [controvers-]. After the defendants herein filed said suit in the Chancery Court of Miller County, Arkansas, said defendants herein filed an answer in the suit at law in this court No. 439 and raised exactly the same issues in the suit at law that are raised in the Chancery suit in the state of Arkansas.

The plaintiff herein brought its suit in the United States District Court before the defendants herein brought their suit in the state Chancery Court. The appellant and plaintiff herein alleges that exactly the same issues are involved in the suit brought by the defendants herein in the state Chancery Court after the suit was brought in the Federal Court and the trial of the case in the Chancery Court of the state will deprive this court of its right and power to decide the issues in this court. The plaintiff herein attaches hereto and makes a part hereof the amended complaint at law in suit No. 439 being the one on which the case was tried and the answer and cross complaint of the defendants herein in said suit 439 and also attaches hereto a copy of the bill of complaint in the State Chancery Court, and the defendants' answer thereto. The plaintiff further alleges that on August 30, 1920, said plaintiff through its counsel appeared before the Honorable F. A. Youmans, Judge of the United States District Court in which this case is pending and applied for a preliminary injunction after due notice given, restraining the defendants from prosecuting the suit in the Chancery Court of the State, said prayer and application for an injunction being based upon the allegation that exactly the same issues in every way are joined in the two suits, and the trial of one suit will leave nothing to be tried in the other suit. The plaintiff herein alleges that the United States District Court first acquired jurisdiction of the case and all causes of action growing out of said controversy referred to and has the right under the law to proceed to a final determination of the issues between said plaintiff and defendant in said suit 439. The appellant, and plaintiff herein alleges that in the hearing on the application of this plaintiff for a temporary injunction which was had as above stated, counsel for the defendants admitted in open court that the trial of the case in the Chancery Court of the state would settle every issue involved in the suit numbered 439 law above referred to. The plaintiff herein alleges that upon the allegation set forth in its bill of complaint in this cause, a copy of which is hereto attached and made a part hereof this plaintiff is entitled to a preliminary injunction and restraining order, enjoining and restraining the defendants herein from the prosecution of their suit in Chancery in the State Court for the reasons and on the grounds set forth in said bill
179 of complaint and especially for the reason that the suit in the Chancery Court is prosecuted for the purpose of depriving the United States District Court, for the Western District of Arkansas, of the right to determine the issues involved in said suit and of which the United States District Court first took jurisdiction. The plaintiff herein alleges that if the defendants herein should be permitted to prosecute their suit in the state Chancery Court the final judgment in said court will leave nothing to be determined by the United States District Court in said suit 439. The defendants are urging and pressing a trial in the Chancery Court of the state and unless restrained will defeat and nullify the jurisdiction of the United States District Court, which court first took jurisdiction of every issue growing out of said contract. The prosecution of said suit in the State Chancery Court, unless restrained, will prevent the United States

District Court from proceeding to a final determination of the issues in said suit at law, which involves all issues based upon the said contract referred to. The plaintiff herein alleges that the sole purpose of bringing the said suit in the Chancery Court of the state was to interfere with the jurisdiction of the United States Court in case No. 439, and that the prosecution of said suit in the state court will wrongfully harass and injure this plaintiff and will prevent the United States District Court from rightfully and effectually determining all issues between the parties hereto, growing out of said contract. The defendants admit that unless restrained they will resort to a final determination of said issues in the said state Chancery Court, and admit that said issues are exactly the same as said issues in the United States District Court. The appellant and plaintiff herein allege that on the hearing for a preliminary injunction and restraining order herein, which was had on the date above named, the Honorable F. A. Youmans, Judge of the United States District Court, denied the plaintiff herein the relief prayed for and this plaintiff alleges that unless this Honorable Court, the Circuit Court of Appeals, assumes jurisdiction of the matter at once and issues a preliminary injunction and restraining order the said defendants will proceed in the prosecution thereof of their suit in the state Chancery Court, to the irreparable damage and injury of the plaintiff herein. The plaintiff alleges that it is ready and willing to give any reasonable bond to be fixed by this court and prays that the interlocutory order of the Honorable F. A. Youmans be set aside and that a preliminary injunction and restraining order be issued and that the defendants herein be enjoined and restrained from the further prosecution of their suit in the State Chancery Court, and from
180 taking evidence therein, and from any further action therein, until the further order of this court.

The petitioner, the Burke Construction Company, being the appellant herein feels ag-rieved by the interlocutory order of the Honorable F. A. Youmans, Judge as aforesaid, denying said preliminary injunction and restraining order, and hereby appeals from said interlocutory order and decree of said district court in the premises and prays that said appeal be allowed and granted, and that the said interlocutory order be annulled and set aside and that a preliminary injunction and restraining order be issued by this court, and that said appeal and all pleadings, orders, mandates, decrees, transcripts, record entries and all other proceedings had in said cause herein, and in cause No. 439, and in the Chancery Court of the State of Arkansas be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that that Honorable Court may hear said cause anew on this appeal and that the interlocutory judgment and decree denying to the plaintiff herein the preliminary injunction and restraining order be reversed and set aside and that an order be made herein granting to the plaintiff herein a preliminary restraining order and a temporary injunction, enjoining the defendants herein from the further prosecution of said suit in equity of the said Chancery Court of Miller County, Arkansas, and for all

other and further relief to which the plaintiff herein may be entitled in equity and good conscience.

THE BURKE CONSTRUCTION COMPANY,
By JAMES B. McDONOUGH,
JAMES D. HEAD,
Its Counsel.

Affidavit.

I, M. C. Burke, on oath state that I am the President of the Burke Construction Company and that the matters and things above set forth in the petition for appeal are true.

I further state that the said Burke Construction Company is not insolvent and that said Burke Construction Company owns a large amount of property in the state of Arkansas, and is constructing roads and other public improvements in the state of Arkansas, and that the amount in controversy herein exceeds the sum of $5,000.00 exclusive of interest and costs.

M. C. BURKE.

181 Subscribed and sworn to before me this 31 day of Aug. 1920.

[SEAL.] JOHN H. VAUGHN,
Notary Public.

My commission expires March 25, 1922.

Appeal granted Sept. 3, 1920.

FRANK A. YOUMANS,
Judge.

Assignment of Errors.

Filed in U. S. District Court September 3, 1920.

Comes the Burke Construction Company, petitioner and appellant herein and files herein the following assignment of errors, appearing upon the record of this cause, which said appellant, the Burke Construction Company avers occurred upon the hearing of said Burke Construction Company for a preliminary injunction and restraining order and for and on account of which the order and judgment of the Honorable F. A. Youmans, District Judge, should be reversed and set aside and a restraining order should be issued by this Honorable Court.

1.

The court below, the Honorable F. A. Youmans presiding, erred in holding that the petitioner herein was not entitled to a temporary injunction and restraining order restraining the defendants from the further prosecution of the suit in Chancery in the Chancery Court of Miller County, State of Arkansas.

2.

Upon the bill of complaint and the answer and the record an the pleadings introduced and the admissions of counsel for the de fendant in open court before the Honorable F. A. Youmans Judg of said court, the said F. A. Youmans presiding erred in not grant ing the relief prayed for in the bill of complaint and in failing an refusing to grant the preliminary injunction and restraining orde as prayed for.

Whereupon the Burke Construction Company, the appellant an plaintiff in this appeal, prays that the interlocutory decree, judg ment and order of the said United States District Court for the West ern District of Arkansas, Texarkana Division, the Honorable F. A Youmans, presiding, rendered on the 30th day of August, 1920 denying and refusing to grant the temporary injunction and re straining order as against the defendants be reversed and that said interlocutory order denying and refusing said temporary in
182 junction and restraining order be set aside, and that this court grant to the plaintiff and appellant herein a temporary injunction and restraining order, restraining the defendants from the further prosecution of said suit in equity in the state Chancery Court, until the further orders of this court, and for all other and further proceedings to which the plaintiff and appellants herein may be entitled, all under the direction and decree and judgment of this court.

THE BURKE CONSTRUCTION COMPANY,
By JAMES D. HEAD AND
JAMES B. McDONOUGH,
Its Counsel.

(*Bond on Appeal.*)

Filed in U. S. District Court September 3, 1920.

Know all men by these presents:

That the Burke Construction Company as Principal and United States Fidelity & Guaranty Co. as surety are held and firmly bound unto John P. Kline, Milton Winham, and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas in the full and just sum of $500.00 as security for costs to be paid to the said defendants, their attorneys and representatives, to which payment well and truly to be made the undersigned bind themselves, their assigns, heirs and administrators jointly and severally by these presents.

Sealed with our seals this 31 day of Aug., 1920.

The above obligation is upon the conditions named below:

Whereas lately and on the 30th day of August, 1920, before the Honorable F. A. Youmans, District Judge of the United States District — for the Western District of Arkansas, Texarkana Divi-

sion, the Burke Construction Company appeared and prayed for an interlocutory order restraining and enjoining the above named defendants from prosecuting their suit in Chancery in the Chancery Court of Miller County, State of Arkansas, and

Whereas the said District Judge upon a hearing denied the relief prayed for and refused to grant the injunction and restraining order, and

Whereas the Burke Construction Company has taken an appeal from the interlocutory order, judgment and decree of the
183 Honorable F. A. Youmans, Judge of said court, and has filed a copy of the proceedings of said cause in the office of the clerk of the Circuit Court of Appeals of the Eighth Circuit, to reverse the said order appealed from, and

Whereas a citation directed to the defendants above named citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals of the Eighth Circuit, to be holden in the city of Denver, state of Colorado, in said Circuit, within the time required by law.

Now The Condition of the above obligation is such that if the Burke Construction Company shall duly prosecute its appeal to effect and answer all costs and make good its plea, then this application shall be void; otherwise the same shall remain in full force and effect.

(Corporate Seal.) THE BURKE CONSTRUCTION COMPANY,
By M. C. BURKE,
Pres.

(Corporate Seal.) UNITED STATES FIDELITY & GUARANTY CO.,
By JOS. V. FERRARI,
Its Atty. in Fact.

Approved by:
FRANK A. YOUMANS,
Judge.

(*Præcipe for Transcript.*)

Filed in U. S. District Court, September 6, 1920.

To William S. Wellshear, Clerk:

In making the transcript in the above cause for the Circuit Court of Appeals for the 8th Circuit please include in the said transcript in addition to the Bill of Complaint and Answer all the papers, documents, pleadings and papers called for and named in the order and decree of the court.

JAMES D. HEAD,
JAMES B. McDONOUGH,
Counsel for Burke Construction Company,
Appellant and Plaintiff in Error.

184 *(Clerk's Certificate to Transcript.)*

I, Wm. S. Wellshear, Clerk of the District Court of the Unit States for the Western District of Arkansas, certify the foregoi pages hereto annexed numbered 1 to 262 inclusive, contain and co stitute a true and correct copy of the record, assignment of erro and all proceedings in the case of Burke Construction Compan Plaintiff, vs. John P. Kline, et al., defendants, No. 47 in Equity, the same appear on file and of record in my said office in the Te arkana Division of said District.

This transcript is certified in return of the appeal of the Bur Construction Company in said cause from said United States D trict Court to the United States Circuit Court of Appeals for t Eighth Circuit.

Citation with telegraphic acceptance of service is annexed an herewith transmitted.

In testimony whereof, I hereunto set my hand and affix the se of said court at office in the City of Fort Smith, Arkansas, this 7t day of September, 1920..

[Seal U. S. Dist. Court West. Dist. Ark.]

WM. S. WELLSHEAR,
Clerk.

Filed Sep. 9, 1920. E. E. Koch, Clerk.

Application of Burke Construction Company for Preliminar Injunction, Pending an Appeal.

In the United States Circuit Court of Appeals, Eighth Circuit.

BURKE CONSTRUCTION COMPANY, Appellant and Plaintiff in Erro

vs.

JOHN P. KLINE, MILTON WINHAM and PAUL G. HUCKINS, as th Board of Improvement of Paving Improvement District No. 2 of the City of Texarkana, Arkansas, Respondents and Defendant in Error.

Comes the Burke Construction Company, and after due notic given to the respondents and defendants in error above named, re spectfully states to the court that the said Burke Construction Co pany on August 24th, 1920, brought a bill in equity in the Unit States District Court, Western District of Arkansas, Texarkana Div sion, entitled Burke Construction Company against John P

185 Kline, Milton Winham and Paul G. Huckins, as the Boar of Improvement of Paving Improvement District No. 20 o the City of Texarkana, Arkansas, and numbered 47 Equity in th Texarkana Division of said United States District Court. A sum

mons was issued in equity in said cause, and served upon the defendants. Thereafter the appellant herein served upon the defendants, a notice that said appellant would apply to the Honorable Frank A. Youmans, United States District Judge for the Western District of Arkansas, in the City of Fort Smith, on August 30th, 1920, for a preliminary injunction, restraining the defendants from prosecuting the same cause of action and the same controversy between the parties hereto in the State Chancery Court. The appellant herein attaches to this application and petition for an order of this court for a preliminary injunction, a copy of the complaint in said suit No. 47, Equity, and also a copy of the answer of the defendants in said cause.

In said bill of complaint in said cause No. 47 Equity, the appellant herein alleged that said appellant had brought suit in the United States District Court, Western District of Arkansas, Texarkana Division, and on the Law side of the docket, a suit entitled Burke Construction Company against the respondents and defendants in error in this cause. This was a suit at Law, and is numbered 439 on the docket of the United States Court, Western District of Arkansas, Texarkana Division. It is alleged in said complaint that the appellant herein brought said suit No. 439 on the 16th day of February, 1920. In said original complaint judgment was prayed for in the sum of $85,250.84. An amended complaint was thereafterwards filed, and a judgment was prayed in a sum exceeding $100,000.00. In said suit No. 439, the respondents herein appeared and answered and filed a counterclaim. A trial was had in the Federal Court on July 20th, which trial occupied about ten days, and resulted in a disagreement of the jury. On the 19th of March, 1920, and after the suit had been brought in the Federal Court, the respondents herein brought a suit based on the same contract, and involving the same issues in every way in the State Chancery Court of Miller County, Arkansas. The only difference in the two suits was that in the suit in the Chancery Court of the State, sureties on the bond of this appellant were made parties defendant. Th appellant herein alleges that said sureties are privy in the right of this appellant in said contract, and there is no cause of action against said sureties, unless a cause of action is first established against this appellant.

186 During the trial of said cause in the Federal Court, the respondents herein suspended the prosecution for the time being, of the same suit in the Chancery, State Court. The same contract was involved in the suit in the State Chancery Court, and the same issued in every way. At the trial of the case in the United States District Court, which began on July 20, 1920, the respondents herein appeared and moved the court to transfer the cause to the Equity side of the docket. The court denied that motion, and the cause was tried before the court and jury. After that cause resulted in a mistrial, the respondents herein notified the appellant that said respondents would proceed with the trial of the same cause of action in the State Chancery Court, and thereupon notified this

appellant that the taking of evidence by way of depositions would be commenced at once, and on the 31st day of August, 1920.

Thereupon, the appellant herein filed its bill of complaint, as a dependent bill to the suit at law, No. 439, and served notice upon the respondents, and applied to the Honorable F. A. Youmans, Judge of said Court on August 30th, 1920, for a preliminary injunction. The respondents herein appeared by their counsel, and filed answer as stated. On the issues joined in that suit in equity, the pleadings and record entries in the suit in the Chancery State Court, and in the Law Suit No. 439 in the Federal Court, and the removal proceedings relating to the removal of the case in the State Chancery Court to the Federal Court were introduced in testimony. After a hearing duly had, the Honorable F. A. Youmans denied the preliminary injunction, to which the appellant herein duly excepted, and thereupon the appellant herein notified the respondent that the appellant would apply to the Circuit Court of Appeals of the Eighth Circuit for an order allowing a preliminary injunction in favor of the appellant herein, and that said application would be made to the Circuit Court of Appeals of the Eighth Circuit at Denver in the State of Colorado, and in the court room in said Circuit Court of Appeals in the City of Denver at 10 o'clock on the morning of September 7th, 1920. Thereafter, and on the 3rd day of September, 1920, the appellant herein led its petition for an appeal, which was duly allowed by the Honorable F. A. Youmans, United States District Judge who tried said cause, and filed at the same time its assignment of errors, and a citation was issued and also a cost bond was duly filed and approved by the Honorable F. A. Youmans. The
187 appellant has therefore perfected its appeal to the Circuit Court of Appeals of the Eighth Circuit, making said cause returnable at St. Louis, as provided by law. This appellant has duly caused to be prepared a transcript of the record in said cause and will file the same, in accordance with law, and within the time allowed by law, in the Clerk's office of the Circuit Court of Appeals at St. Louis.

In the meantime, this appellant alleges that for the reasons set forth in its bill of complaint in said cause No. 47 Equity in the United States District Court, Western District of Arkansas, Texarkana Division, and because the Judge of said court refused to grant the preliminary restraining order, the respondents herein will, to the irreparable damage and loss of the appellant herein, proceed with the trial of said cause of action in the State Chancery Court, and will thereby impede, defeat and deprive the United States District Court, Western District of Arkansas, Texarkana Division, of its right to hear and determine said cause, unless restrained by a preliminary injunction granted by this court. The appellant alleges that it has no complete remedy at Law, and that the preliminary injunction should be granted herein, as prayed in its bill of complaint, which appears in the record of this cause. The appellant alleges that it is ready and willing to give any reasonable bond that may be required by any order of this court, and thereupon prays that this court make an order granting the preliminary injunction

upon such conditions and terms as to this court may seem just, and that the order of the Honorable F. A. Youmans, District Judge, denying the preliminary injunction, be set aside and the preliminary injunction granted, as prayed.

JAMES D. HEAD,
VINCENT M. MILES,
JAMES B. McDONOUGH,
Counsel for Burke Construction Company.

Endorsed: Filed in the U. S. Circuit Court of Appeals, September 8, 1920.

188 *Response to Application for Preliminary Injunction.*

In the United States Circuit Court of Appeals, Eighth Circuit.

BURKE CONSTRUCTION COMPANY, Appellant and Plaintiff in Error,

vs.

JOHN P. KLINE, MILTON WINHAM and PAUL G. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20, of the City of Texarkana, Arkansas, Respondents and Defendants in Error.

Now come the respondents and defendants in error, John P. Kline, Milton Winham and Paul G. Huckins, by W. H. Arnold, and Frank S. Quinn, Counsel, and files this their response to the application of Plaintiff in Error for a temporary injunction herein; and in resistance to the said application the Respondents and Defendants in Error here set up and rely upon their original answer, filed in the United States District Court, for the Western District of Arkansas, in answer to the Bill of Complaint originally filed herein. And Respondents and Defendants in Error adopt all of the allegations of said original answer as a part of this Response and makes the said Answer a part hereof. And defendant further shows that plaintiff's alleged cause of action for damages is not involved or made a part of the issues in the state court.

Wherefore, Respondents and Defendants in Error pray that the Application of Plaintiff in Error for a Temporary and Preliminary injunction herein be denied; and for all other proper relief.

W. H. ARNOLD,
FRANK S. QUINN,
Counsel.

Endorsed: Filed in the U. S. Circuit Court of Appeals, September 8, 1920.

189 (*Order of the U. S. Circuit Court of Appeals Granting Pre liminary Injunction.*)

No. 5706.

United States Circuit Court of Appeals, Eighth Circuit, Septembe Term, 1920.

Saturday, October 2, 1920.

BURKE CONSTRUCTION COMPANY, Appellant,

vs.

JOHN P. KLINE, MILTON WINHAM and PAUL C. HUCKINS, as th the Board of Improvement of Paving Improvement District No 20 of the City of Texarkana, Arkansas.

Messrs. James D. Head, Vincent M. Miles and James B. McDon ough, Counsel for Burke Construction Company.

Messrs. W. H. Arnold and Frank S. Quinn, Counsel for John P. Kline, Milton Winham and Paul G. Huckins, as the Board of Im provement of Paving Improvement District No. 20 of the City o Texarkana, Arkansas.

The Burke Construction Company applied to this Court for a tem porary injunction, and after notice and full hearing of the parties through their respective counsel, these facts appeared: A controversy arose over the respective rights and liabilities of the Burke Con struction Company, a corporation of the State of Missouri, on the one hand, and on the other the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, John P. Kline, Milton Winham and Paul C. Huckins, who composed such board as members thereof and as individuals, all of whom are citizens of the State of Arkansas—under that certain contract between the Construction Company on the one hand and them on the other, dated November 29, 1916. On February 16, 1920 the Construction Company commenced an action at law in the United States District Court of the Western District of Arkansas, to obtain an adjudication of that controversy and a judgment against the Board and its mem bers for a breach of that contract. Subsequently, on March 19, 1920, the Board and its members brought a suit in equity against the Con struction Company, James A. Burke, M. C. Burke and the United States Fidelity & Guaranty Company in the Chancery Court in Mil ler County in the State of Arkansas, to obtain an adjudication of the rights and liabilities of the contesting parties as against themselves under the contract of November 29, 1916, which suit is claimed by the Construction Company to involve the controversy which is in volved in the action first brought by the Construction Company in the United States District Court. Thereupon the Burke Con-

190 struction Company brought a suit in equity in the United States District Court for the Western District of Arkansas

against the Board and its members for a temporary injunction to prevent them from further prosecuting or taking evidence in their suit in equity in the Chancery Court in Miller County until the Construction Company's action at law could be tried in the Federal Court. On notice and hearing the court below denied the application of the Construction Company for the injunction. That company appealed to this court from that order of denial and then made the application in this court for a preliminary injunction on the ground that the Board and its members are about to proceed to take testimony in and proceed to the trial of their suit in the chancery court in Miller County before the Construction Company can get the controversy determined by a trial in the Federal Court where it brought the first action. Upon consideration of the pleadings and the arguments of counsel and the record on the appeal from the order denying the injunction,

It is hereby ordered, adjudged and decreed, that until the decision and decree of this court upon the controversy and issues presented by the appeal from the order of the court below denying the application for the injunction, the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, John P. Kline, Milton Winham and Paul G. Huckins, as members of said Board and as individuals, their attorneys, agents, servants, and employes, and each of them, be and they are hereby strictly enjoined from and forbidden to take any testimony in, to proceed to a hearing on, or a trial of the suit in the chancery court in Miller County, in the State of Arkansas, in which they are plaintiffs or complainants, and the Burke Construction Company is defendant, or to do any other act or thing to advance that suit or any proceeding therein to a hearing or disposition.

It is further ordered and decreed that this order and decree go into force and take effect forthwith, and, on condition that the Burke Construction Company makes and files in this court within thirty days, a bond with security approved by the Judge or Clerk of the United States District Court of the Western District of Arkansas in the sum of $3,000.00, conditioned to pay, in case this injunction shall be adjudged improvidently issued, to the Board and to its members, any and all damages they or either of them sustains on account thereof, then this injunction shall continue in force until the final decision and judgment of this court upon the appeal. But if the Construction Company fails to file such bond within said
191 thirty days, this injunction shall cease to have any force or effect after the expiration of said thirty days.

October 2, 1920.

Endorsed: Filed in the U. S. Circuit Court of Appeals, October 2, 1920.

(*Injunction Bond of the Burke Construction Company.*)

In the United States Circuit Court of Appeals, Eighth Circuit.

BURKE CONSTRUCTION COMPANY, Appellant,

vs.

JOHN P. KLINE, MILTON WINHAM and PAUL C. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas.

Know all men by these presents; that the Burke Construction Company, as principal, and Southern Surety Company, as surety, are held and firmly bound unto John P. Kline, Milton Winham, and Paul G. Huckins, as the Board of Improvement of Paving Improvement District Number 20 of the City of Texarkana, Arkansas, in the sum of $3,000.00, Three Thousand Dollars, to the payment of which the undersigned bind themselves, each for himself and his heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 5th day of October, 1920.

The condition of the above obligation is such that

Whereas in the cause above entitled in the Circuit Court of Appeals, sitting at Denver, in the State of Colorado, and on Saturday, October 2, 1920, the Circuit Court of Appeals made an order, a copy of which is hereto attached and made a part hereof, enjoining the defendants above named, as members of the Board of Improvement named, and as individuals, and their attorneys, agent, servants and employees and each of them from proceeding to a hearing on or a trial of the suit in the Chancery Court in Miller County, in the State of Arkansas, in which the parties defendant above named are plaintiffs, and the Burke Construction Company is defendant, and

192 Whereas said order further enjoined said defendants from doing any other act or thing to advance that suit or any proceeding therein to a hearing or disposition, and

Whereas it was further ordered and decreed that said order and decree go into force and take effect forthwith and on condition that the Burke Construction Company files in said Circuit Court of Appeals within 30 days from October 2, 1920, a bond with security approved by the Judge or Clerk of the United States Court of the Western District of Arkansas, in the sum of Three Thousand Dollars conditioned to pay in case said injunction should be adjudged improvidently issued, any and all damages the defendants or either of them may sustain on account thereof, and

Whereas it was also ordered that said injunction should continue in force until the final decision and judgment of this court upon the appeal.

Now, therefore, if the Burke Construction Company fully complies with the orders and decrees of the Circuit Court of Appeals as named in said order, and if it fully and completely pays any and all damages that said defendants or either of them may sustain on account of said

injunction, then and in that event this obligation shall be null and void. Otherwise the same shall remain in full force and effect.

Witness our hands and seals this 5th day of October, 1920.

[SEAL.] THE BURKE CONSTRUCTION COMPANY,
By M. C. BURKE,
President.
SOUTHERN SURETY COMPANY,
By E. J. DAVIS,
Secretary.

Approved Oct. 20, 1920.

FRANK A. YOUMANS,
Judge.

* * * * * * *

(Here follows copy of the Order of the U. S. Circuit Court of Appeals granting Preliminary Injunction which is omitted at this point to avoid duplication, the same appearing at marginal page 189 of this printed record.)

Endorsed: Filed in the U. S. Circuit Court of Appeals, October 22, 1920.

190 (*Appearance of Mr. Vincent M. Miles as Counsel for the Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5706.

BURKE CONSTRUCTION COMPANY, Appellant,

vs.

JOHN P. KLINE, et al., etc.

The Clerk will enter my appearance as Counsel for the Appellant.

VINCENT M. MILES.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sep-. 8, 1920.

(*Appearance of Mr. James B. McDonough and Mr. James D. Head as Counsel for the Appellant.*)

The Clerk will enter my appearance as Counsel for the Appellant.

JAMES B. McDONOUGH,
Fort Smith, Ark.
JAMES D. HEAD,
Texarkana, Ark.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sep-. 18, 1920.

194 (*Appearance of Counsel for the Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.

FRANK S. QUINN.
WILLIAM H. ARNOLD.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sep-. 8, 1920.

(*Motion of Appellees to Modify Injunction of United States Circuit Court of Appeals, etc.*)

I.

Now comes the defendant, John O. Kline, Milton Winham and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and moves the Court to modify the restraining order heretofore issued herein, October 2, 1920, restraining the defendant from proceeding with the case of the said Board of Improvement against the Burke Construction Company, James A. Burke, M. C. Burke and the United States Fidelity & Guaranty Company, pending in the Chancery Court of Miller County, Arkansas, so that said defendant may proceed in the Chancery Court against all of the defendants except the Burke Construction Company, in as much as said suit is for the recovery of a liability upon a bond given by said Burke Construction Company with James A. Burke, M. C. Burke and the United States Fidelity & Guaranty Company as sureties. The said bond is joint and several as to liability, and the said defendant had and has the right to pursue all or either of said obligors upon said bond, but the order of injunction herein prohibits this defendant from pro-
195 ceeding against not only the Burke Construction Company, but the other signers of said bond who are not parties to the suit pending in the District Court, it being a suit for damages by the Burke Construction Company alone against the defendant herein, and said other parties would not be bound to pay any judgment which this defendant might recover upon its counterclaim in the District Court against the Burke Construction Company, but could require this defendant to bring said suit to recover the liability thereon regardless of the result of the case in the District Court.

II.

The defendant moves the Court to issue an order herein restraining the Burke Construction Company, its agents and attorneys, from further proceeding with the trial of the case in the District Court of the Burke Construction Company vs. Paving Improvement District No. 20, being suit No. 439, Law, under the same terms and condi-

tions that this defendant has been restrained from proceeding with its case in the Chancery Court, which is in the following language:

"It is hereby ordered, adjudged and decreed, that until the decision and decree of this Court upon the controversy and issues presented by the appeal, etc., the Board of Improvement of Paving Improvement District No. 20, etc., be and they are hereby strictly enjoined from taking any testimony in, or to proceed to a hearing on, or the trial of the suit in, the Chancery Court of Miller County, State of Arkansas, etc." And a copy of the order of this Court finding the facts and restraining this defendant is hereto attached as Exhibit "A" and made a part hereof, for the information of the Court in passing upon this Motion.

This defendant states that this suit was instituted by the Burke Construction Company in the District Court of the United States on the — day of August, A. D. 1920, for the purpose
196 of enjoining the defendant from taking depositions in said Chancery case pending in the Chancery Court of Miller County, Arkansas, or trying said case, and upon presentation of the bill and answer to Hon. F. A. Youmans, August 30, 1920, the temporary injunction applied for was refused, it being apparent that the Chancery Court had concurrent jurisdiction of the issues involved in said Court with the District Court in the case of Burke Construction Co. v. said District, and that neither Court had exclusive jurisdiction, there being no property in the hands of either Court, and there was no reason why said case should be treated as an exception to the general rule, that the said cases could proceed independent of each other according to the authorities, a list of which will be hereto appended, decided by the Circuit Court of Appeals for the 8th Circuit, and by the Supreme Court of the United States.

Thereafter on August 31, 1920, this defendant proceeded to take its testimony in the Chancery Court of Miller County, Arkansas, before Hon. J. D. Shaver, Chancellor, and occupied about four days in taking said testimony, and then said cause was continued on motion of the Burke Construction Company, to September 27, 1920, and in the meantime, thereafter, a petition for temporary injunction herein was presented to the Honorable Circuit Court of Appeals for the 8th Circuit, Denver Colorado, on September 8, 1920, but the Court did not act upon said application for injunction until the 2nd of October, 1920, when a restraining order was issued herein against the defendant proceeding in the Chancery Court, "Until the decision and decree of this Court upon the controversy and issues presented by the appeal from the order of the Court below, etc."

On September 27, 1920, the Chancery Court of Miller County, Arkansas, resumed the hearing of evidence in said case, and the plaintiff and defendant both took evidence therein for five
197 days, ending on Friday, October 1, 1920, and thereupon on motion of the Burke Construction Company said case was postponed until October 18, 1920, when said cause could have been finally tried and decided, or shortly thereafter, and before the filing of the motion herein, but for the restraining order which was issued in this Court, and under that order the defendant is compelled to

wait and take no action in said cause until this cause may be heard before the Court of Appeals upon its merits, which appears upon the Court's Calender for the St. Louis Court, January 12, 1921; and in the meantime the District Court of the United States for the Western District of Arkansas, will convene in regular session November 8, 1920, when the case of Burke Construction Company against this defendant will be subject to call and when the defendant has reason to believe and alleges that said plaintiff will proceed to try said cause at the earliest practical time, in order that the defendant herein may not have an opportunity to proceed in the trial of said cause in the Chancery Court, which said defendant submits it has a right to try in the usual and orderly transaction of the business of said Chancery Court of Miller County, Arkansas, where said cause is pending, which Court has jurisdiction of said cause there pending under the constitution and laws of the State of Arkansas, and which Court has entertained said cause, according to the rule of Chancery practice in force in said State, as shown by a similar case, styled Burke Construction Company v. Paving Improvement Dist. No. 5, Fort Smith, 120 Ark. page 435.

On or about the 23rd day of October, 1920, this defendant's attorneys were informed by letter from the Clerk of this Court that the bond was filed by the Burke Construction Company under the restraining order issued herein against the defendant, which made the injunction herein against the defendant effectual and binding.

198 As shown by the record in this cause, the suit filed by this defendant in the Chancery Court of Miller County, Arkansas, was for an accounting which is a subject of equity jurisdiction, making all of the parties to said bond defendants, two of whom are residents of the Western District of Arkansas, and could not be sued in the Federal Court. Said suit was filed March 18, 1920, and the defendants Burke Construction Company and M. C. and J. A. Burke, did not file answers therein until about the 8th of July, 1920, and the United States Fidelity & Guaranty Company not until the first part of August, 1920, and in the meantime, the Federal Court met in May, 1920, and heard arguments upon motions and demurrers, and settled the pleadings in said cause in the Federal Court and set the case for trial July 20, 1920, when the trial of said cause was begun and continued for about ten days, which resulted in a mistrial. The defendant contended in said cause, that it was an action of accounting and settlement between the parties, which could not be tried with any degree of certainty before a jury, and that it was properly cognizable in a court of equity, but defendant's motion to transfer to equity was overruled. There is no truth in the claim and allegation of the plaintiff in this cause that the suit in the Chancery Court was instituted for the sole purpose of defeating the United States of jurisdiction, or to prevent a trial therein, and the facts bear the defendant out that they did not undertake to interfere with the trial in the Federal Court by undue efforts to have the Chancery Court case disposed of first, but on the other hand this defendant waited without pressing the Chancery Court case until after full opportunity was given for the trial of said cause in the

District Court beginning July 20, 1920, as hereinbefore stated, and it was not until after that Court had adjourned for the term that the defendant then resumed its pursuit of the liability of the makers of said bond in the Chancery Court, which it believes it had a right to do under the Federal decisions, and that it should have done in the discharge of the duty and responsibility resting upon the defendant; and it is advised and believes that it has the right under
199 the federal law, as well as under the state law, to proceed in the usual and orderly way of trying said case in the Chancery Court, and that said State and Federal Court- have concurrent jurisdiction, and are not antagonistic, and that each has a due regard for the other in the disposition of such cases, and that neither court should undertake to interfere with a party proceeding as he may see fit according to the rules of law in the trial of such case, where a personal liability alone is involved.

The defendant states that if the Burke Construction Company is permitted to go ahead unrestrained in the trial of said case in the Federal Court, that said Company will have an undue and unfair advantage over this defendant, and this defendant will be deprived of its right to a trial of this cause before the Circuit Court of Appeals upon its merits, unless a restraining order of the same nature is issued against said Company proceeding in said District Court, and this defendant asks the Court now to restrain said Burke Construction Company from so proceeding, and that the respective rights of the parties be held in statu quo, until this cause may be disposed of by the Circuit Court of Appeals.

Furthermore, the defendant states that if the restraining order is maintained herein against this defendant, and the Burke Construction Company is permitted to go ahead with its suit, then the merits of this cause may resolve itself into a mere moot question, the decision of which may not be of any advantage to the defendant, on account of its being deprived of the right to proceed in said State Court, and said defendant would further be deprived of an appeal to the Supreme Court of the United States if the issues herein should be tried and disposed of in the case of Burke Construction Company against this defendant before this cause is heard in the Court of Appeals on its merits.

200 Wherefore Defendant prays that the temporary injunction herein be modified so as to permit the defendant to proceed in the Chancery Court of Miller County, Arkansas, against M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company upon the bond signed by them, and further prays that the appellant, the Burke Construction Company, be enjoined from further proceeding with its suit in the United States District Court for the Texarkana Division of the Western District of Arkansas, No. 439 Law, until the decision and decree of the Circuit Court of Appeals for the 8th Circuit shall be rendered upon the hearing of this appeal.

W. H. ARNOLD,
FRANK S. QUINN,
Attorneys for Defendant.

STATE OF ARKANSAS,
County of Miller:

Frank S. Quinn on oath states that he is one of the attorneys for the defendant Board of Improvement of Paving Improvement District No. 20 of the State of Arkansas; that he has read the allegations and statements of the above and foregoing motion, and that the same are true.

FRANK S. QUINN.

Subscribed and sworn to before me this 1st day of November, 1920.

[SEAL.]

G. G. POPE,
Notary Public.

201 EXHIBIT "A."

* * * * * * *

(Here follows Exhibit A, which is a certified copy of the Order of October 2, 1920, of the U. S. Circuit Court of Appeals granting Preliminary Injunction, which is omitted at this place for the reason that a copy thereof appears on page 189 of the record.)

The pendency in a State Court of an action in personam which involves no claim to or lien upon specific property in the possession of or under the dominion of a National Court presents no ground for a dependent bill to stay proceedings in a State Court.

The Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas, submits the following authorities in support of its position that the injunction against its proceedings in its case in the State Court cannot be sustained on final hearing herein:

Stanton vs. Embry, 93 U. S. 548.
Ogden City vs. Weaver, 108 Fed. Rep. 568.
Barber Asphalt Paving Co. vs. Morris, 132 Fed. 948.
Gates vs. Bucki, 53 Fed. 961.
Merritt vs. Barge, 79 Fed. 228.
Zimmerman vs. Sorrell, 80 Fed. 417.
Standley vs. Roberts, 59 Fed. 836.
Insurance Co. vs. Harris, 97 U. S. 331.
McClellan vs. Carland, 217 U. S. 268.
Defiance Water Co. vs. City of Defiance, 100 Fed. 178.
Woren vs. Witherbee, Sherman & Co. 240 Fed. 1043.
In re: Lasserot, 240 Fed. 325.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 4, 1920.

202 (*Notice of Motion of Appellees to Modify Injunction of Circuit Court of Appeals, etc.*)

To the Burke Construction Company and James D. Head, James B. McDonough and Mr. V. M. Miles, Attorneys for said Burke Construction Company:

You are hereby notified that the Appellee, the Board of Improvement of Paving Improvement District No. 20, of the City of Texarkana, Arkansas, John P. Kline, Milton Winham and Paul G. Huckins, as the members of said Board, will on Thursday, November 4th, 1920, at ten o'clock in the forenoon, at the United States government building in the City of St. Louis, Mo., in which the Honorable Court of the Eighth Circuit Court of Appeals sits, or as soon as possible thereafter, present to the Honorable presiding judge of said Circuit Court of Appeals, Judge Sanborn, a motion to modify the injunction heretofore obtained on the 2nd day of October, 1920, against the Appellee herein, and also for a restraining order against the Appellant herein, restraining it from proceeding to trial with its case at law in the United States District Court for the Texarkana Division of the Western District of Arkansas, pending against the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and being Case No. 439, all as prayed in the prayer of said motion, a copy of which is hereto attached.

Given under our hands this November 1, 1920.

W. H. ARNOLD,
FRANK S. QUINN,
Attorneys for Appellee.

203 STATE OF ARKANSAS,
County of Miller:

I, A. J. Gurley, Sheriff of Miller County, Arkansas, do hereby certify that I have duly served the within Notice, with copy of motion therein specified attached, to Mr. James D. Head, Attorney for the Burke Construction Company, in Miller County Arkansas, on this the 1st day of November, (First Day of November), A. D. 1920, the other parties mentioned in said Notice being absent from Miller County, Ark.

This November 1, 1920.

A. J. GURLEY,
Sheriff.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 4, 1920.

(*Response of Appellant to Motion to Modify Injunction.*)

Comes the appellant and for response to the motion of the appellees above referred to, states as follows:

This defendant denied that the appellees are entitled to the relief prayed for in paragraph one of said motion and allege- that the mat-

ters in controversy in that paragraph have been fully gone over by the court in the opinion handed down and this motion in its entirety is in effect a petition for a rehearing and should be denied.

For response to paragraph two of said motion this appellant alleges that all of the matters set forth therein are matters that were submitted to this court when this court had under consideration the
204 question of whether or not an injunction would be issued against the appellees herein, restraining them from proceeding in the State Chancery Court, and all of the matters therein alleged are fully covered and set up in the pleadings in that case, which case now stands before this court for final argument and submission on January 12, 1921 and this appellant has ordered the record printed herein and has forwarded to the clerk the fees required for the printing of the record and is now engaged in the preparation of its brief and all of the questions set forth in said motion are involved in the final decision of this court on the questions heretofore presented and which are to be here finally decided by this court on January 12, 1921.

This appellant further states that this motion was served upon counsel for the appellant at a time when neither counsel of the appellant was able to appear in this court in opposition to this motion and the said appellant, therefore, previously asked for time in which to respond to said motion. The appellant further shows that its counsel have not yet had time in which to prepare in detail a full and complete response to said motion, because said counsel have been in court every day with the exception of two from the date of the service of this motion down to the present time.

Premises considered the appellant prays that said motion be denied and that this cause be permitted to stand for hearing and submission on January 12, as now set.

JAMES D. HEAD,
JAMES B. McDONOUGH,
Attorneys for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 9, 1920.

205 *(Notice and Motion of Appellees to Advance and Dismiss Appeal.)*

Notice.

To the Appellant, Burke Construction Company, or its Attorneys of record, James B. McDonough, J. D. Head and Vincent M. Miles:

You are hereby notified that John P. Kline and others, appellees in the above entitled cause, will on the 9th day of December, 1920, at 10 o'clock a. m., or as soon thereafter as the same can be heard, present to the Honorable United States Circuit Court of Appeals for the Eighth Circuit, sitting in the City of St. Louis, Missouri, in the

court room of the said Court, a motion to advance and dismiss the appeal herein, a copy of which motion is hereto attached.

This 29th day of November, 1920.

W. H. ARNOLD,
FRANK S. QUINN,
Attorneys for Appellee.

Service copy of this notice accepted and formal service waived this 29th day of Nov. 1920.

JAMES B. McDONOUGH AND
JAMES D. HEAD,
Attorneys for Appellant.

* * * * * * *

Motion to Advance and Dismiss Appeal.

Now comes the appellee by its attorneys, W. H. Arnold and Frank S. Quinn, and respectfully moves the Court to advance this cause, and to hear and dismiss the same, and for cause shows:

206 That this is an appeal from an interlocutory order of the Honorable F. A. Youmans, Judge of the District Court for the Western District of Arkansas, denying an application by appellant for a temporary injunction against the appellee, and that under the terms of the statute under which this appeal has been taken, being Section 129 of the Judicial Code, 36 Statutes at Large, Section 1134, this appeal takes precedence and should be heard and disposed of with the least possible delay.

And appellee further shows that the question raised by this appeal has been decided adversely to the appellant's contention by this Court, in the recent case of W. E. Stewart Land Company vs. Arthur, decided August 23, 1920, reported in 267 Federal, page 184, in which it is held that the pendency of two or more actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the other suits.

Wherefore appellee prays that this case be advanced and disposed of immediately, that the temporary injunction herein granted be dissolved, and that the appeal be dismissed, and for all other proper relief.

W. H. ARNOLD,
FRANK S. QUINN,
Attorneys for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 30, 1920.

(*Order of Submission of Motions to Advance and Dismiss and to Modify Injunction.*)

December Term, 1920.

Before Judges Sanborn and Stone.

Thursday, December 9, 1920.

This cause came on this day to be heard upon the motion
207 of appellees to advance the same on the calendar for the present December Term and to dismiss, and the further motion of appellees to modify the injunction in this Court granted October 2, 1920, and for an order restraining the plaintiff from proceeding with the trial of the case of Burke Construction Company vs. Paving Improvement District No. 20, being suit No. 439, Law, in the District Court of the United States for the Western District of Arkansas, and the response of appellant. After hearing argument by Mr. Frank S. Quinn for appellees the said matters are by the Court taken under advisement, the same also being submitted to Judge Trieber as a third Judge without oral presentation.

(*Order Denying Motions of Appellees to Advance and Dismiss, etc., and Postponing Consideration of Motion to Modify Order of October 2, 1920.*)

December Term, 1920.

Tuesday, December 21, 1920.

On consideration of the motion of appellees to advance this cause on the calendar for the present December Term, 1920, and to dismiss the same, and the further motion of appellees for an order restraining the appellant, Burke Construction Company, its agents and attorneys, from further proceeding with the trial of the case of Burke Construction Company vs. Paving Improvement District No. 20, being suit No. 439, Law, in the District Court of the United States for the Western District of Arkansas, and the response of appellant thereto. It is now here ordered by this Court that the said motions be, and the same are hereby, denied.

It is further ordered that the consideration of the motion of
208 appellees to modify the restraining order issued by this Court herein on October 2, 1920, be, and the same is hereby, postponed until the hearing of the appeal in this case which is set for January 12, 1921.

December 21, 1920.

(*Order of Submission.*)

December Term, 1920.

Before Judges Sanborn, Lewis and Cotteral.

Friday, January 14, 1921.

This cause having been called for hearing in its regular order, the same was submitted on brief by appellant and argued by Mr. Frank S. Quinn and Mr. William H. Arnold for appellees.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

209 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1920.

No. 5706.

BURKE CONSTRUCTION COMPANY, Appellant,

vs.

JOHN P. KLINE et al., as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, Appellees.

Appeal from the District Court of the United States for the Western District of Arkansas.

Mr. James B. McDonough and Mr. James D. Head submitted brief for appellant.

Mr. Frank S. Quinn and Mr. W. H. Arnold for appellees.

Before Sanborn, Circuit Judge and Lewis and Cotteral, District Judges.

SANBORN, *Circuit Judge*, delivered the opinion of the court.

This is an appeal of the Burke Construction Company, a corporation, a citizen and resident of the State of Missouri, from an order denying its application for an injunction restraining the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, a corporation and citizen of the State of Arkansas, the members of the Board, its attorneys, agents, and representatives, from prosecuting a suit in equity it brought against the Burke Construction Company and others on March 19, 1920, to obtain a trial and adjudication of the same controversy between these two citizens,

to obtain a trial and adjudication of which, the Burke Com-
210 pany had brought an action at law against the Board and its members in the United States District Court of the Western District of Arkansas to recover $85,250.84 on February 16, 1920. The controversy between the two corporations involved their respective liabilities, each to the other, under a contract between them, made on November 29, 1916, whereby the Burke Company agreed to pave certain streets in the town of Texarkana, under which contract it had partially paved those streets. The Burke Company alleged in its complaint for the $85,250.84 that in all things it had complied with and was ready and willing to fulfill the terms of the contract between them, but that the board failed to pay it according to the terms thereof moneys which it had earned, wrongfully and arbitrarily changed the requirements of the agreement after it was made, unnecessarily delayed the Burke Company in its work thereunder, unlawfully seized and appropriated to its own use the tools, machinery and equipment of the Burke Company which it had furnished to perform the contract, notified and compelled it to cease performance before the contract was completed, and committed other breaches of the agreement to the damage of the Burke Company in the amount stated.

In the subsequent suit which the Board brought in the State Chancery Court of Arkansas in March, 1920, against the Burke Company it counted on the same contract, joined with the Burke Company as defendants M. C. Burke, J. A. Burke and the United States Fidelity & Guaranty Company, signers of the Burke Company's bond as sureties for its faithful performance of the contract, alleged among other things that the Board had complied with its obligations thereunder, but that the Burke Company had failed to complete its performance thereof though notified to do so, that the Board held in its hands $13,752.45 retained percentages of the compensation that had been earned by the Burke Company on the work it had completed previous to November, 1919, $60,000 balance of $150,000 the Board had received for bonds of the District it had sold to pay for the paving under the contract and the compensation earned by the Burke Company in November, 1919, amounting in all to approximately $77,000.00, that it had taken the tools, machinery and equipment which the Burke Company had provided for itself to perform the contract, that it will cost $80,000 to complete its performance,
211 and that there is "a conflict between plaintiff and defendants upon many subjects arising under said contract" and the Board prayed that (1) an accounting be had with reference to the work that had been done by the Burke Construction Company under the agreement, and (2) that the Board have judgment against the Burke Construction Company and the sureties on its bond for $80,000, the amount required to complete performance of the contract and have judgment for other damages, that it retain and use the Burke Company's tools, machinery and equipment and the $77,000 in money.

On July 2, 1920, the Board filed its answer to the complaint of the Burke Company in the action in the Federal Court in which it

enied many of the averments of the Burke Company in its com-laint, repeated the allegations of the Board in its complaint in he State Chancery suit, set up a counter claim and prayed for a udgment against the Burke Company for $99,498.63 the amount hen alleged to be required to complete performance of the con-ract, for a lien on the $77,000 in its hands, and for other relief. n July, 1920, the action in the Federal Court below was tried to a ury which disagreed. Counsel for the Board then gave notice hat they would proceed with the prosecution of its suit against he Burke Company and its sureties in the State Chancery Court.

In this state of facts the Burke Company brought this suit in quity in the Federal Court below against the Board and its mem-ers, setting forth in its complaint the facts which have been re-ited, and prayed for an injunction against the Board, its mem-ers, its attorneys, representatives and servants from proceeding vith the taking of testimony or the further prosecution of its suit n the State Chancery Court until after the trial and adjudication f the controversy between these citizens of different states in the ction first brought in the Federal Court below and the enforce-nent of its judgment or decree by that court.

The controversy which was the subject thereof was between itizens of different states. Of that controversy between these itizens of different states and of the parties to that suit the court elow acquired full jurisdiction by the filing of the complaint and he commencement of that suit by the Burke Company on March 9, 1920. By the Constitution of the United States, Article III, Section 2, and the Acts of Congress, 1 U. S. Comp Stat. 1916, 212 Section 991, the constitutional right was granted to the Burke Company to ask and to have a trial and adjudication of that ontroversy and the enforcement of that adjudication by the Federal Court. If the Board, which subsequently on March, 1920, brought ts suit against the Burke Company and the sureties on its bond o secure an adjudication by that court of the same controversy etween the same citizens by a race of diligence lawfully may secure uch an adjudication in the suit in the State Court before in the rderly and proper course of proceeding in the suit in the Federal Court, the Burke Company is able to obtain such an adjudication nd the enforcement thereof in the Federal Court, then the Federal Court's adjudication will be made futile because before it has ren-dered it the controversy will have become res adjudicata by the ad-judication of the state court, Boatmen's Bank v. Fritzlen, 135 Fed. (8 C. C. A.) 650, 667; Insurance Co. v. Harris, 97 U. S. 331, 336; Barber Asphalt Paving Co. v. Morris, 132 Fed. (8 C. C. A.) 945, 951, and the Burke Company will have been deprived of the right granted to it by the Constitution of the United States to the deter-mination of its controversy with the Board by the trial and adjudica-tion thereof by the Federal Court which first acquired jurisdiction of it and of the parties thereto.

A citizen who would exercise this constitutional right usually is compelled to bring his suit in the Federal Court in the state of the residence of the defendant in order to get service of process upon

and jurisdiction of him. The reason for the grant to him by the constitution, and in this case to the Burke Company of this right to have the decision of its controversy with the citizen of another state by the Federal Court, was thereby to avoid the local attachments and prejudices in favor of the defendant that those who made the constitution feared might injuriously affect the administration of Justice in the state courts against the claims of citizens of other states and the question which this case presents is:

When a citizen of one state, in the exercise of his constitutional right to an adjudication of a controversy he has with a citizen of another state, brings a personal action against the latter in the proper federal court in the state of the defendant's residence and citizenship, invokes and persistently demands an adjudication of that controversy and the enforcement of that adjudication by that federal
218 court, and that court first acquires full jurisdiction of the controversy and the parties to it, may the defendant, by subsequently commencing a suit in one of the courts of his state against the plaintiff in the first suit and others to secure an adjudication of the same controversy, and by pressing it to a judgment or decree before an adjudication can be obtained in the Federal Court, deprive the plaintiff of his constitutional right to an adjudication of the controversy and enforcement thereof by the federal court, oust that court of the jurisdiction first acquired by it and render the action in it futile,—or may the federal court which first acquires jurisdiction of the controversy and of the parties lawfully protect and preserve its jurisdiction, its adjudication of the controversy and the enforcement thereof by the use of its injunction against the defendants who seek to deprive it of jurisdiction, their attorneys, representatives and agents? The first impression which the presentation of the question presents to the mind is that it should be so answered as to preserve and enforce the right of the citizen to the trial and decision of his controversy by the federal court which the constitution and the Acts of Congress granted to him. Counsel for the Board, however, while they concede that where courts have concurrent jurisdiction of the same parties and controversies the court which first acquires jurisdiction of the res in a controversy holds it against courts in which subsequent suits are brought concerning that thing, contend that this case falls under the rule that actions in personam between the same parties concerning the same controversies may proceed at the same time in courts of concurrent jurisdiction and the adjudication first obtained renders the controversy decided res adjudicata as against a subsequent adjudication in the other court and renders the suit therein futile. But the answer to this contention is that, in the case at bar, after the Burke Company had invoked the jurisdiction of the federal court and had thereby exercised its constitutional right to an adjudication of its controversy by that court, that federal court had exclusive jurisdiction to hear and decide the controversy and the state court in which the subsequent action was brought had no concurrent jurisdiction thereof as long as the Burke Company insisted upon and demanded its constitutional right. In the investigation,

study and decision of this question the fact must be borne in mind that general statements, in text books and in opinions in cases in which the right of neither of the parties to the exclusive determination of the controversy involved by the federal court by virtue
214 of Article III, Section 2 of the Constitution was not claimed, demanded, thoughtfully considered, or adjudged, that actions in personam involving the same issues between the same parties may proceed at the same time in courts of concurrent jurisdiction, are neither authoritative nor persuasive on the question in this case, because in such cases it is probable that the claim of this constitutional right never came to the mind of or was determined by the writer. Bearing this rule of law and of reason in mind let us consider the authorities cited by counsel for the Board.

Stanton v. Embrey, 93 U. S. 548, 554, is the leading case for the general rule that actions in personam involving the same controversy between the same parties may proceed at the same time in courts of concurrent jurisdiction and the adjudication first obtained prevails. But in Stanton v. Embrey the plaintiff first brought an action for $10,000 and interest against the defendants for services in one of the courts of the State of Connecticut. The same plaintiffs subsequently brought an action for the same cause against the same defendants in one of the courts in the District of Columbia. The defendants pleaded the first suit in abatement of the second suit, and the Supreme Court held that the pendency of the prior suit in the state court was not a bar to the subsequent suit between the same parties for the same cause of action in the court of the District of Columbia. No question of the constitutional right of a plaintiff in a first suit in a federal court to the determination of his controversy by that court either existed, was presented, considered, or decided.

In Woren v. Witherbee, Sherman & Co. and in Kuzman v. same, 240 Fed. 1013, the same state of facts, so far as they relate to the question under discussion here existed as in Stanton v. Embrey.

In W. E. Stewart Land Co. v. Arthur, 267 Fed. 184, (8th C. C. A.) the land company first sued Arthur the defendant, upon two checks and a promissory note in the Federal Court in the state of Iowa. Subsequently the land company, the same plaintiff, sued Arthur the same defendant in one of the courts in Oklahoma on the same instruments and attached property in that state. Arthur the defendant who had not invoked or claimed any constitutional right to a trial of the controversy in the federal court sought to have that
215 court enjoin the land company from proceeding to take testimony in the Oklahoma case, and this court held that he was not entitled to such an injunction. But here no question of the constitutional right of the land company which alone invoked the jurisdiction of the Federal Court to an adjudication of its controversy was presented or decided, for, by itself bringing its second action in the state court it waived and renounced its constitutional right to the decision of the controversy by the federal court and submitted itself to the jurisdiction of the state court. And Arthur never invoked or claimed any such constitutional right. If, after the land company had brought its action in the federal court in Iowa, the defend-

ant Arthur had brought a suit in Oklahoma against the Land Company for an adjudication of the controversy between these parties, and the land company had insisted upon its constitutional right to an adjudication by the Federal Court and sought an injunction to prevent Arthur from depriving it of that right by an early decision of the question in the Oklahoma court, a different question would have been presented and a different answer returned. In Merritt v. American Steel-Barge Company, 79 Fed. 228, 229, 230, 231 (8th C. C. A.) the Merritts, citizens of Minnesota, brought an action in one of the courts in the state of Minnesota against the Barge Company, a citizen of New York, for damages for its alleged conversion of certain corporate stock and personal property. The Barge Company removed the action to the federal court in Monnesota. After that removal the Barge Company itself, which, against the protests of the Merritts, had invoked the jurisdiction of the Federal Court by removing the case to that court, sued the Merritts in a state court of New York to determine the rights of the respective parties to the stock and personal property involved in the controversy in the Minnesota case, and obtained a decree in the New York court to the effect that all this property belonged to the Barge Company, and that decree was held to render the matters there adjudged res adjudicata at the subsequent trial of the action in the Federal Court in Minnesota. But no question of the constitutional right of the Barge Company or of the Merritts to the adjudication of its controversy by the Federal court was presented or adjudged, for, the Barge Company which had invoked its jurisdiction of the controversy had renounced its right to such an adjudication by invoking and securing the adjudication of its controversy by the New York state court and the Merritts never claimed any such right under the constitution.

216

The cases upon which counsel for the Board seem to rely with the most confidence have now been reviewed. Others that have been cited by them, and read and considered by the court are Ogden City v. Weaver, 108 Fed. (8th C. C. A.) 564; Barber Asphalt Paving Co. v. Morris, 132 Fed. (8th C. C. A.) 945; Gates v. Bucki, 53 Fed. (8th C. C. A.) 961; Buck v. Colbath, 70 U. S. 334; Stanley v. Roberts, 59 Fed. (8th C. C. A.) 336; Insurance Co. v. Harris, 97 U. S. 331; In re Lasserot, 240 Fed. 325; Zimmerman v. So Relle, 80 Fed. (8th C. C. A.) 417; McClellan v. Carland, 217 U. S. 268; Defiance Water Co. v. City of Defiance, 100 Fed. 118; Bellamy v. St. Louis, Iron Mtn. & S. S. Ry. Co., 220 Fed. (8th C. C. A.) 876; St. Louis & I. M. Ry. Co. v. McKnight, 244 U. S. 368; Baltimore & Ohio R. Co. v. Wabash R. Co., 119 Fed. 678, 682. But no opinion or decision in any case where the question was presented, argued, or seriously considered by the court, has been found to the effect that a citizen of one state, who had the constitutional right to the adjudication of a controversy between himself and a citizen of another state, who brought a suit in personam or in rem to obtain such adjudication in a federal court that first obtained jurisdiction of the controversy and of the parties, and who persistently claimed his constitutional right, could be deprived of it by a subsequent suit in a state court brought by the defendant in the Federal Court against the plaintiff

therein, or against him and others, to obtain a determination of the same controversy by the state court or by any other action which the defendant in the Federal Court might take.

On the other hand, the plain terms of the grant of this right in the constitution and in the Acts of Congress, the reason for and the purpose of it, the supremacy of the constitution and of the rights granted under it to the citizens of the United States and of the authority and jurisdiction vested by it in the Federal Courts, the more persuasive reasons and the authorities converge with compelling force to establish these conclusions:

When a citizen of one state, in the exercise of the right granted to him by the constitution and the Acts of Congress to an adjudication of a controversy judicable in a federal court between him
217 and a citizen of another state brings a suit in personam or in rem against the latter in the proper federal court to obtain the adjudication of that controversy by that court, and that court first acquires jurisdiction of that controversy and of the parties thereto and the plaintiff therein persistently demands the adjudication of the controversy by the federal court the defendant in that suit may not deprive the plaintiff of his constitutional right to such an adjudication by the federal court or of the enforcement thereof by that court by bringing a subsequent suit in a state court against the plaintiff in the federal court or against him and others to obtain an adjudication by the latter court of the same controversy or of that controversy and of other controversies, or by any other action or proceedings such a defendant may take. Sharon v. Terry, 36 Fed. 337, 354; Brown v. Fletcher, 231 Fed. 92, 94; Wadley v. Blount, 657, 670, 672, 673, 674, 675, 676; Taylor v. Taintor, 83 U. S. 366, 370; Ex Parte Young, 209 U. S. 123, 162; Prout v. Starr, 188 U. S. 537, 544; Gamble v. City of San Diego, 79 Fed. 487, 500. "The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction," Chicot County v. Sherwood, 148 U. S. 529, 533, 534, nor may they unduly or unnecessarily postpone the hearings or delay the proceedings in their courts to the disadvantage of suitors vested with the right to a determination of their controversies by such courts by the constitution and the Acts of Congress. McClellan v. Carland, 217 U. S. 268; McClellan v. Carland, 187 Fed. (8th C. C. A.) 915, 919. The power is conferred and the duty is imposed on a federal court, which, at the suit of a citizen of one state against a citizen of another state, to secure from it an adjudication of a controversy between them judicable in the federal court and which first acquires jurisdiction of the controversy and the parties, to protect its jurisdiction of and its power to adjudicate the controversy and to enforce its adjudication by its injunction against any subsequent proceedings in a state court or elsewhere by the defendant, his attorneys, agents or representatives which would or might have the effect to defeat or impair its jurisdiction, its adjudication, its orders, judgments or decrees or its en-

forcement thereof. Looney v. Eastern Texas Ry. Co., 247 Fed. 214, 221; Wells Fargo & Co. v. Taylor, 41 Sup. Ct. Rep. 96; Wallace v. McConnell, 13 Pet. 143; French v. Hay, 22 Wall. 250; Dietzsch v. Huidekoper, 103 U. S. 494; St. Louis-San Francisco Ry. Co. v. McElvain, 253 Fed. 123, 131; Sharon v. Terry, 36 Fed. 337, 364, 365, 366; Julian v. Central Trust Company, 193 U. S. 93, 113; Swift v. Black Panther Oil & Gas Company, 244 Fed. 20, 22; Wadley v. Blount, 65 Fed. 667, 669, 670, 671, 673, 674, 675; Starr v. Chicago, R. I. & P. Ry. Co., 110 Fed. 3, 6, 7; Prout v. Starr, 188 U. S. 537, 544; Smyth v. Ames, 169 U. S. 466.

218

In Sharon v. Terry, 36 Fed. 337, the controversy was between citizens of different states concerning the effect and breach of a marriage contract as the controversy here is concerning the effect and breach of a paving contract. The plaintiff in the Federal Court first brought suit against the defendant and the defendant subsequently brought a suit against the plaintiff in a state court to secure an adjudication of the same controversy and obtained the earlier decree, but the federal court held the decree of the state court void because it was violative of the constitutional right of the plaintiff to an adjudication of the controversy and the enforcement of that adjudication by the federal court, because, for the defendant, after the federal court had acquired jurisdiction of the controversy and the parties to proceed in a suit in the state court against the plaintiff to obtain an adjudication of the controversy by that court, would, if effective, defeat the object of the suit in the Federal court, and Judge Field said: "William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him, and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings, elsewhere, oust that court of its jurisdiction and rightful authority to decide the case. The constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states,—a provision which had its origin in the impression that local attachments and prejudices might injuriously affect the administration of justice in the state courts against the claims of citizens of other states. * * *.

"The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other."

219

And the conclusion is that the power was vested in and the duty was imposed upon the court below to prevent by its injunction, until it could adjudge the controversy between the Burke Company and the Board and its members, and could enforce its final judgment or decree in the suit in that court, the prosecution by the Board, its members, attorneys, agents or representatives of its suit in the

state court against the defendants therein or any of them which would or might interfere with, delay, or impair the effect of its adjudication between the Burke Company and the Board involved in the first action which was brought by the Burke Company in that court.

This conclusion renders further discussion and any extended treatment of the motions in this case unnecessary. The contention of counsel for the Board, however, that the injunction issued by this court was too broad because it restrained it from prosecuting any action against the sureties on the bond of the Burke Company to perform the contract, has received consideration but it has not proved convincing. The liability of the sureties is conditioned by the liability of the Burke Company under the contract even if they may be severally or separately sued. English v. Shelby, 116 Ark. 212, 220, and a suit by the Board against, and a recovery of them or of either of them might, and if the Burke Company were properly called to defend, as it probably would be, probably would determine its liability to pay the amount of that judgment to the surety or the Board before the court below could adjudicate the controversy that conditions the liability of the Board, the Burke Company, and the sureties. The constitutional right of the Burke Company to the exclusive adjudication of this controversy and to the enforcement of that adjudication by the federal court may not be lawfully evaded or avoided by the Board, or by its members, or agents, either by joining the sureties of the Burke Company as defendants with the latter in a suit by the Board against them, or by suing them separately in a state court to obtain in that court an adjudication of the controversy between the Burke Company and the Board which conditions the liability of each to the other and the injunction to be issued pursuant to this decision should be broad enough to prevent any such result.

Let the order and decree from which this appeal was taken be reversed, let this case be remanded to the court below with instructions to issue its injunction in accordance with the views expressed in this opinion, let the injunction issued by this court herein be and it is continued in force until the injunction to be issued by the court below, pursuant to this opinion, takes effect, let the motions of the board and its members for a modification of the injunction issued by this court and for an injunction against the prosecution by the Burke Company of its action first brought in the Federal Court below be denied, and let the Burke Company recover its costs in this court.

Filed March 18, 1921.

LEWIS, District Judge, delivered the following dissent:

Taking the two proceedings as both in personam, I admit at once that the jurisdiction of the Federal court in the law action cannot be ousted or obstructed by the suit in equity brought later in the State court; and I think an admission to the converse is equally necessary, that the jurisdiction of the State court cannot be ousted

or obstructed by the prior action in the Federal court. Each party had a right to invoke, by appropriate procedure, the jurisdiction of the tribunal to which he appealed, and I do not conceive that the right of one is any greater in that respect than that of the other. Each is a suitor before a court with plenary power to decide the one controversy, and there is no presumption that one will decide it better, or more justly, than the other. Jurisdiction is the right and power to hear, consider and determine a controversy between parties litigant. How, then, does the exercise of that power by the State court interfere with or impede the exercise of the same power by the Federal court? The same right, duty and power is lodged in each, it is concurrent, and when exercised by one the controversy is at an end. There would then be no longer a cause in which the power could be exerted, and there could be no conflict or interference. The controversy would become res adjudicata, and the parties plaintiff had an equal right to proceed until that end was reached.

I understand this to be the rule of comity which came out
221 of the necessities of our dual system, and which, it is said, ripened long ago into a principle of right and law. I had believed that this court had firmly announced its adherence to the rule in Merritt v. Steel-Barge Co., 79 Fed. 228, wherein it is said at page 232: "Although a judgment may be rendered in the second suit before the first suit is tried, and may be pleaded in bar in the latter suit because the issue and the parties to the two suits are the same, yet it has never been supposed that the fact that a judgment of another court is offered in evidence to conclude the parties on a given issue or issues either defeats or impairs its jurisdiction, or has any necessary tendency to occasion a conflict of authority;" and in Ogden City v. Weaver, 108 Fed. 564, wherein it is said, at page 568: "It is simply one of those cases, such as frequently occur, where a State court and a Federal court, in the exercise of a jurisdiction which rightfully belongs to each, are called upon to determine the same question, and the fact that they may disagree and decide the question differently in no wise interferes with the right of either to proceed;" and in Stewart Land Co. v. Arthur, 267 Fed. 184. In B. & O. R. Co. v. Wabash R. Co., 119 Fed. 678, Judge Jenkins, speaking for the court in the Seventh Circuit, said: "Where a suit is strictly in personam, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law." Supporting authority may be found in the cases cited above. In Arthur's case, supra, he was first sued by the Land Company in a Federal court in Iowa, and later by the same plaintiff on the same cause of action in a State court in Oklahoma. This court held that the Land Company should not be enjoined in the maintenance of both actions against him at the same time; and to me it seems an unjust rule that permits the plaintiff to maintain

the second action and denies an equal right to the defendant. I think the order of the District Judge denying the writ in this case should be affirmed, and I therefore dissent.

Filed March 18, 1921.

222 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1920, Friday, March 18, 1921.

No. 5706.

BURKE CONSTRUCTION COMPANY, Appellant,

vs.

JOHN P. KLINE, MILTON WINHAM, and PAUL G. HUCKINS, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas.

Appeal from the District Court of the United States for the Western District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas and the motions of appellees for a modification of the injunction issued by this Court on October 2, 1920, and for an injunction against the prosecution by the Burke Construction Company of its action first brought in the said District Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the above motions be, and the same are hereby, denied, and that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Burke Construction Company have and recover against John P. Kline, Milton Winham and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, the sum of — Dollars for its costs in this behalf expended and have execution therefor.

223 It is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with instructions to issue its injunction in accordance with the views expressed in the opinion of this Court and the injunction issued by this Court in this cause on October 2, 1920, is hereby continued in force until the injunction to be issued by the said District Court, pursuant to the opinion of this Court, takes effect.

March 18, 1921.

(Præcipe for Transcript on Application to Supreme Court U. S. for a Writ of Certiorari.)

Frank S. Quinn,
Attorney and Counselor,
Texarkana, Ark.

April 14, 1921.

Mr. E. E. Koch,
Clerk U. S. Cir. Court of Appeals,
St. Louis, Missouri.

DEAR SIR:

Will you kindly make up copy of all papers in the case of Burke Construction Company v. John P. Kline, et al., No. 5706, except the Respon-e of Appellant to Appellees' Motion to Modify, filed on November 27, 1920.

Yours very truly,

FRANK S. QUINN,
Attorney for Appellees.

F. S. Q.—S.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 15, 1921.

224 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of counsel for appellees, in a certain cause in said Circuit Court of Appeals wherein Burke Construction Company was Appellant and John P. Kline, et al., as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, were Appellees, No. 5706, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this twenty-first day of April, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court, of Appeals for the Eighth Circuit.

225. In the United States Circuit Court of Appeals, Eighth Circuit.

No. 5706.

BURKE CONSTRUCTION COMPANY, Appellant,

v.

JOHN P. KLINE et al., as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, Appellees.

Stipulation.

We, the undersigned counsel of record in case No. 5706, styled Burke Construction Company, Appellant, versus John P. Kline et al. as the Board of Improvement of Paving Improvement District No. 20 of the city of Texarkana, Arkansas, pending in the United States Circuit Court of Appeals for the Eighth Circuit, do hereby agree that the record on file with the clerk of the United States Supreme Court which was presented with the petition for writ of certiorari herein may be taken as a return to the writ of certiorari issued to said court by the United States Supreme Court and attested by the clerk June 14th, 1921, directing the said Circuit Court of Appeals to send to the Supreme Court the record of said court in said case No. 5706 to the end that said cause may be reviewed by the Supreme court; and this stipulation shall be filed with the Circuit Court of Appeals to which said writ is addressed and the clerk of said court is authorized to send a certified copy thereof as his return to said writ.

Witness our hands this June 18th, 1921.

FRANK S. QUINN, &
W. H. ARNOLD,
Counsel for Appellees;
JAMES B. McDONOUGH,
Counsel for Appellant.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 5706. Burke Construction Company, Appellant, vs. John P. Kline, et al. Stipulation as to return to Writ of Certiorari. Filed Jun. 24, 1921. E. E. Koch, Clerk.

226 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Burke Construction Company is appellant, and John P. Kline et al., as The Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, are appellees, No. 5706, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Arkansas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do

227 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Joseph McKenna, Senior Associate Justice of the Supreme Court of the United States, the fourteenth day of June, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

228 [Endorsed:] 321—21. File No. 28,268. Supreme Court of the United States. No. 911, October Term, 1920. John P. Kline et al., as The Board of Improvement of Paving Improvement District No. 20, etc., vs. Burke Construction Company. Writ of Certiorari. Filed Jun. 24, 1921. E. E. Koch, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Burke Construction Company, Appellant, v. John P. Kline, et al., as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, No. 5706, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this twenty-fifth day of June, A. D. 1921.

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk U. S. Circuit Court of Appeals
for the Eighth Circuit.

229 [Endorsed:] File No. 28,268. Supreme Court U. S., October Term, 1921. Term No. 321. John P. Kline et al., etc., petitioners, vs. Burke Construction Co. Writ of certiorari and return. Filed June 27, 1921.

(4536)

No. 321.

IN THE

Supreme Court of the United States

OCTOBER 10th, 1921.

JOHN P. KLINE, MILTON WINHAM AND PAUL G. HUCKINS, AS THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20, TEXARKANA, ARKANSAS, PETITIONER,

VS.

BURKE CONSTRUCTION COMPANY, RESPONDENT.

Motion of the Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas, Petitioner Herein, to Advance This Cause for Oral Argument and Early Submission.

Comes the petitioner above named and moves the court to advance this cause for oral argument and early submission upon the grounds and for the reasons stated below:

This cause is here by reason of the granting by this court of a petition for writ of certiorari which was filed May 12, 1921, directed to the Circuit Court of Appeals of the Eighth Circuit to review the decision of said court in the cause of Burke Construction Company, appellant vs. John P. Kline, *et al*, as the Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas, Appellee, which is reported in Federal Reporter, Volume 271 at page 605. In that cause the Circuit Court of Appeals issued an injunction against said Board of Improvement further proceeding in the prosecution of suit No. 692 pending in the Chancery Court of Miller County, Arkansas, which was instituted by said board upon a bond for $300,000.00 executed by the Burke Construction Company as principal and the United States Fidelity & Guaranty Company, M. C. Burke and J. A. Burke as sureties, for the recovery of $99,498.36 on account of breach of contract by the Burke Construction Company in the failure to complete a certain paving contract between the said Board of Improvement and the said Burke Construction Company for paving in the City of Texarkana, Arkansas. The United States Circuit Court of Appeals reversed the decree of Honorable Frank A. Youmans, Judge of the District Court of the United States for the Western District of Arkansas, Texarkana Division, said District Court having dismissed the bill for injunction as being without merit (R. 19). There was a dissenting opinion by Judge Robert E. Lewis in the Circuit Court of Appeals (R. 179). The bill for the injunction alleged that the Burke Construction Company

had filed suit, February 16, 1920, in the District Court of the United States for the Western District of Arkansas, Texarkana Division, the cause being numbered 439, to recover damages in the sum of $114,331.60 against the said board of improvement for alleged breach of said paving contract (R. 4), and that the defendant, for the purpose of depriving the Federal Court of its jurisdiction to hear the said cause No. 439, brought suit in the Chancery Court of Miller County, Arkansas, March 19, 1920 against the said Burke Construction Company, the United States Fidelity & Guaranty Company of Baltimore, Md., and M. C. Burke and J. A. Burke, as sureties on the bond which the said Burke Construction Company had given to said Board, which is the suit numbered 692 above mentioned.

Your petitioner, on January 28, 1922, filed with the clerk of this Honorable Court its brief in this cause containing a statement of the cause and the law applicable, showing as they believe that the said decree of the Circuit Court of Appeals should be reversed and said board relieved from said injunction.

The Honorable Circuit Court of Appeals granted a temporary injunction from prosecuting said cause in the Chancery Court upon said bond, the conditions of which had been broken by reason of the Burke Construction Company quitting the paving contract at a time when the work was only half completed, on the 2nd day of October, 1920, sitting at St. Louis (R. 158).

The suit of the Burke Construction Company in the Federal court only involved a suit for damages by said

company against said board for alleged breach of contract, and said suit was brought on the law side of the docket. The United States Fidelity & Guaranty Company, M. C. Burke and J. A. Burke were not parties to said suit, and the last two named could not have been made parties as they were residents of Fort Smith, Arkansas which is in the same Federal District in which the said board of improvement resides. The chancery cause was for an accounting and settlement of complex accounts, both for work done and that which had to be done, and involved parties and issues which were not involved in the Federal Court cause, but the temporary, as well as the permanent injunction which was subsequently issued on full hearing (R. 179) restrained the board from proceeding against any of said defendants to collect the liability on said bond. On the 1st of November, 1920 the board filed a motion to modify said Temporary Injunction in the Circuit Court of Appeals (R. 163) so that the said Board could proceed in the Chancery Court against the United States Fidelity & Guaranty Company, M. C. Burke and J. A. Burke upon said bond, who were not parties to the Federal Court cause, which motion was resisted by the plaintiff, Burke Construction Company (R. 167). On November 30, 1920, the Board filed a motion to advance said cause in the United States Circuit Court of Appeals under the terms of a Federal Statute under which said appeal was taken, being Section 129 of the Judicial Code providing that such appeals should take precedence and be heard and disposed of with the least possible delay (R.

169) which said Section reads, as follows: "Whereupon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granitng, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court; Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below, shall not be stayed unless otherwise ordered by that court, of the appellate court, or a judge thereof, during the pendency of such appeal; Provided, however, that the court below may in its discretion, require as a condition of the appeal an additional bond."

The motions to modify and to advance were both resisted by the Burke Construction Company (R. 167) and they both postponed until the final hearing of the appeal, January 12, 1921 (R. 170), and on the hearing of said cause finally, the board was enjoined from proceeding against any of said defendants until the final disposition of the said damage suit No. 439 in the Federal Court (R. 179).

The bill for the injunction was filed in the Federal Court on the 23rd day of August, 1920 (R. 19). The law case pending in the Federal Court, No. 439 was tried the previous July 1920 in a ten-days trial beginning July 20, which resulted in a mis-trial, and the case was continued until the November term of the United States District Court, which began the second Monday in November, 1920. It was after this trial had been finished that the board of Improvement gave notice to counsel for the Burke Construction Company that owing to the importance of the cause to the District in a proceeding to collect the damages resulting from the breach of the bond given to secure the performance of contract that they felt that they should proceed to take depositions in said Chancery cause with a view to having it brought to trial. The board had in no wise attempted to put off said cause No. 439 or to evade the trial thereof, while on the other hand the said Board agreed to and sought to expedite the said trial in the Federal Court which was begun on July 20, 1920, the date fixed by the court for said trial, and it was after said trial had resulted in a hung jury that the said Board undertook to revive the cause in the Chancery Court, but the efforts to prosecute said cause were stopped by said temporary injunction. In the meantime, when the Federal Court met in November, 1920 the Burke Construction Company attempted to force said law case Numbered 439 to trial, and at that time the Court of Appeals had not passed upon the merits of said injunction cause, and the District Court postponed the trial of said cause numbered 439, being loath to take such

action as would deprive the board of its right to proceed in the Chancery Court should it be finally determined that the said board had the right to proceed in that cause; and subsequently, January 12, 1921, the court of Appeals made said injunction final, then followed the May term, 1921 of the District Court of the United States for the Western District of Arkansas when the Burke Construction Company, through its counsel, was prepared to insist upon a trial of said cause Numbered 439, notwithstanding a petition for writ of certiorari had been filed in the Supreme Court of the United States by said board of improvement to review the decision of the Court of Appeals, but owing to the illness of the judge the said court was adjourned until November, 1921, and in the meantime the petition for writ of certiorari was granted by the Supreme Court of the United States, and the writ was issued June14, 1921 and return duly made thereon and filed June 24th, 1921 (R. 184). Shortly preceding the convening of the United States District Court at its regular term, November 1921, the board of improvement presented to the Honorable Frank A. Youmans, Judge of said Court, a motion for continuance of said cause numbered 439 on the ground that the trial of said cause would affect the rights of said Board of Improvement if it should be determined by the Supreme Court that the injunction was erroneously granted by the decree of the Honorable Circuit Court of Appeals of the Eighth Circuit, which motion was resisted by counsel for Burke Construction Company, but the motion was granted and an order was entered continuing the cause when the court

met in November, 1921, on account of the pendency of said injunction suit on certiorari in the United States Supreme Court. Thereupon the Burke Construction Company filed a petition for mandamus against the District Court of the United States for the Western District of Arkansas, Texarkana Division in the Circuit Court of Appeals for the Eighth Circuit sitting at St. Paul, but the said petition was denied about the 5th of November, 1921, the Court of Appeals holding that said court was not satisfied that the judge of the District Court had erred in refusing to try said cause Numbered 439 in view of the pendency of said cause on certiorari in the United States Court.

The Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas, petitioner herein, represents that on account of the breach of contract by the Burke Construction Company that said paving in Texarkana, Arkansas remains only about half completed and some of said streets have been plowed up and were left and remained in a bad condition for traveling public, and the completion of said work had been tied up and prevented by reason of said litigation, and a collection of the liability of said bond has been suspended and it would be greatly to the interest of the people of said City of Texarkana, Arkansas that said cause in the Supreme Court should be advanced and determined so that said board may know whether it might proceed with a suit upon said bond and collect the liability thereon in the Chancery Court of Miller County, Arkansas, or whether they will be required to wait until such time as the suit

brought by the Burke Construction Company in the Federal Court shall be finally settled and determined. The said board is of the opinion and believes that a final decision of the suit in the Federal Court will not and should not affect the liability of the sureties upon said bond to said District. Both suits are suits in personam and no property of any sort is in possession or control of either court by reason of said litigation, and the board of improvement are advised and believe that said courts each have jurisdiction of said causes and have the right to proceed concurrently, and there has been no act on the part of said board which could be construed as a lack of respect or confidence in the Federal Court, and said suit in the State Court was brought in the belief that the Chancery Court was best adapted to handling and disposing of the complex and numerous accounts involved in the litigation in said court.

Your petitioners here cite and refer to Section 129 of the Judicial Code which has hereinbefore been copied in full, providing that appeals taken over a decree granting an injunction shall take precedence in the Appellate Court; which said section of the statute, it is submitted, intends that a cause of this nature should be treated as one having precedence over other causes, and although it is implied by the language that it should be applied on the appeal to the Circuit Court of Appeals and not strictly in cases before the Supreme Court of the United States, yet it would appear that it was intended by said Section that a cause involving an injunction should be given the earliest practicable hearing and disposition.

Your petitioners are further informed and believe that this is a cause of great interest to the public at large with reference to the granting of said injunction against the proceeding for the collection of the debt in the State Court; the granting of the injunction being solely upon the ground that some of the issues and some of the parties in the State Court may be the same as those in the Federal Court in a case in personam. It is obviously important that the Supreme Court of the United States determine said question as early as is practicable so that parties similarly situated may know how to proceed, and in order that the true principles governing such cases may be established and settled in place of the conflicting decisions in the lower courts now existing by reason of the decision in the case at bar which is now sought to be reviewed, and may it please Your Honors to advance this cause upon the docket for oral argument for as early a time as is practicable, and for other relief.

FRANK S. QUINN,
WILLIAM H. ARNOLD,
WILLIAM H. ARNOLD, JR.,
DAVID C. ARNOLD,
Solicitors for Petitioner.

This April 3rd, 1922.

Certificate.

State of Arkansas, County of Miller.

I, William H. Arnold, do hereby certify that I am counsel for the petitioner, the Board of Improvement of Paving Improvement District No. 20 of the City of

Texarkana, Arkansas, in the above entitled cause and I further certify that in my opinion the suggestion and motion for the advancement of this cause is well taken for the reasons set forth above.

April 3rd, 1922.

WILLIAM H. ARNOLD,
Counsel for Petitioner.

INDEX.

	Page
Notice of Application for Writ of Certiorari.....	1
Application for Writ of Certiorari.....	3
Affidavit of Attorneys and Certificate of Counsel..	15
The Reasons Assigned Why the Writ Should Be Granted.....	6
Statement of the Case.....	17
Argument showing that the law case in the Federal Court of Burke Construction Co. vs. John P. Kline et al., and the Chancery case pending in the State Court of John P. Kline et al. vs. Burke Construction Co. and the sureties on the bond, may proceed concurrently, and that the Chancery case does not conflict with the jurisdiction of the Federal Court, both actions being in *personam* and no property being involved.....	23
Argument showing that the Eighth Circuit Court of Appeals has held that a defendant who is sued in a Federal Court in an action in *personam*, may file and prosecute a suit in a State Court involving the same matter, and that such action is not considered in conflict with the jurisdiction of the Federal Court, which decision would have been conclusive of the case at bar but for the fact that the Circuit Court of Appeals did not follow the same, holding that the plaintiff may subsequently bring suit in a State Court but that the defendant cannot. (See Sub-division 2 of Brief).....	31

INDEX.

Page

The Brief and Argument showing that the case of Board of Improvement of Paving Improvement District No. 20 filed in the Chancery Court of Miller County, Ark., against Burke Const. Co., and sureties on the bond involve different issues, measures of relief and parties, and that a judgment in the suit in the Federal Court would not be *res adjudicata* as to the sureties on the bond 32

The dissenting opinion of Lewis, J., who sat as one of the judges in the disposition of the case in the Eighth Circuit 41

Motion for the Writ of Certiorari 43

CASES CITED.

Barber Asphalt Pav. Co. vs. Morris, 132 Fed. 948 27, 28

Buck vs. Colbath, 3 Wall. 334 . . . . . 24, 25

Baltimore & Ohio R. Co. vs. Wabash R. Co., 119 Fed. 678 . . . . . 11, 29

Corpus Juris, Vol. 1, Sections 110, 122, 127 29

Corpus Juris, Vol. 15, pages 1153 to 1165 30

Chicago, R. I. & P. R. Co. vs. Dowell, 229 U. S. 102 33

Chicago, R. I. & P. R. Co. vs. Schwyhart, 227 U. S. 184 33

Defiance Water Co. vs. City of Defiance, 100 Fed. 178 28

Galt vs. Hildreth, 3 American Law Reports, 114 40

Gates vs. Bucki, 112 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961 . . . . . 27, 28

Insurance Company vs. Harris, 97 U. S. 331 . . . 25, 26

Page

In re: Lasserot, 240 Fed. 325 28

Lewis, J., Dissenting Opinion and Authorities Cited 41

Kirby's Digest of the Statutes of Arkansas, Sections 5719, 6009, 6010, 6229, 6230, 6232,..... 35, 36

Merritt vs. American Steel Barge Co., 79 Fed. 228 .....11, 23, 42

McClelland vs. Carland, 217 U. S. 268..... 28

Ogden City vs. Weaver, 108 Fed. 564..... 11, 25, 42

Stanton vs. Embrey, 93 U. S. 548 ..... 25, 26

Standley vs. Roberts, 19 U. S. App. 407, 59 Fed. 836..... 25, 26, 28

Sharon vs. Terry, 36 Fed. 337 31

Sully vs. Campbell (Tenn.), 43 L. R. A. 161..... 41

Stewart Land Co. vs. Arthur, 267 Fed. 184.. 6, 11, 27, 42

State Bank vs. Robinson, 13 Ark. 214..... 37

Woren vs. Witherbee, Sherman & Co., 240 Fed. 1013 27

Zimmerman vs. So Relle, 49 U. S. App. 387, 25 C. C. A. 518, 80 Fed. 417..... 27, 28

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

JOHN P. KLINE, MILTON WINHAM AND PAUL G. HUCKINS, AS THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20, OF TEXARKANA, ARKANSAS, PETITIONERS,

VS.

BURKE CONSTRUCTION COMPANY, RESPONDENT.

SIRS:

Please take notice that the petition of John P. Kline, Milton Winham and Paul G. Huckins as the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, a copy whereof is herewith served upon

you, together with the transcript of record in the cause, will be presented to the Supreme Court of the United States at a session of the court thereof, to be held in the City of Washington, District of Columbia, on the 31st day of May, 1921, at the opening of the court.

Dated this 7 day of May, 1921.

Yours, etc.,

FRANK S. QUINN,
WILLIAM H. ARNOLD,
Texarkana, Arkansas.
Attorneys for Petitioners,

To:

JAMES B. McDONOUGH, ESQ.,
Ft. Smith, Arkansas,
JAMES D. HEAD, ESQ.,
Texarkana, Arkansas,
Attorneys for Respondent.

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

JOHN P. KLINE, MILTON WINHAM AND PAUL G. HUCKINS, AS THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20, OF TEXARKANA, ARKANSAS, PETITIONERS,

VS.

BURKE CONSTRUCTION COMPANY, RESPONDENT.

PETITION

On Application for Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, the Supreme Court of the United States:

Your petitioners, John P. Kline, Milton Winham and Paul G. Huckins as the Board of Improvement of

Paving Improvement District No. 20 of the City of Texarkana, Arkansas, respectfully presents its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit and represent and allege the following as a summary and short statement of the matter involved and the general reasons relied upon for the allowance of the writ:

Your petitioners seek to review a decision of the Circuit Court of Appeals for the Eighth Circuit which reversed a decree of the United States District Court for the Western District of Arkansas, Texarkana Division, denying the petition of the Burke Construction Company for a temporary injunction restraining the petitioners, John P. Kline, Milton Winham and Paul G. Huckins as the Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas, from taking depositions and proceeding with a suit instituted by said Board in the Chancery Court of Miller County, Arkansas, to recover judgment against the Burke Construction Company and the sureties on its bond as Contractor, United States Fidelity & Guaranty Company, J. A. Burke and M. C. Burke.

The Circuit Court of Appeals for the Eighth Circuit, at a preliminary hearing of the appeal of the Burke Construction Company at Denver, Colorado, October 2, 1920, made an order that until the decision and decree of said court upon the controversy and issues presented by the appeal from the order of the court below denying the application for the injunction, the Board of Improvement of Paving Improvement District No. 20

of the City of Texarkana, Arkansas, John P. Kline, Milton Winham and Paul G. Huckins as members of said board and as individuals, and their attorneys, agents, servants and employees and each of them be strictly enjoined from and forbidden to take any testimony in, to proceed to the hearing on or the trial of the suit in the Chancery Court of Miller County, in the State of Arkansas, in which they are plaintiffs, or complainants, and the Burke Construction Company is defendant, or to do any other act or thing to advance said suit, or any proceeding therein to a hearing or disposition (Record 189-190).

The said Board of Improvement presented a petition on November 4, 1920, to the Circuit Court of Appeals for the Eighth Circuit sitting at St. Louis to modify the injunction so as to permit the Board of Improvement to proceed in the Chancery Court of Miller County, Arkansas against all of the defendants to said suit except the Burke Construction Company inasmuch as said suit is for a recovery of the liability upon the bond given by the Burke Construction Company with the United States Fidelity & Guaranty Company, James A. Burke and M. C. Burke as sureties, which is joint and several as to liability under the Arkansas law, and the motion was by the court denied December 9, 1920 (Record 201-202); and subsequently the said Board filed a motion to advance and affirm the decision of the lower court, as the advancement is authorized by Section 129 of the judicial code, and affirmation of the case would follow a recent decision of the United States

Circuit Court of Appeals, Eighth Circuit, *W. E. Stewart Land Co.* v. *Arthur*, decided August 23, 1920, in 267 Fed. page 184, which was taken under advisement (Record 202-203).

The case was decided March 18, 1921 (Record 205-214) and the judgment of the lower court which had denied the injunction prayed for by the Burke Construction Company was reversed and the cause remanded to the court below with instructions to issue its injunction against further prosecution of said suit in the Chancery Court of Miller County, Arkansas as to the Burke Construction Company, and as to the other defendants in said cause, and the motions of the Board for a modification of the injunction issued by said court, October 2, 1921, was denied and judgment was rendered that the Burke Construction Company recover its cost in said court.

A certified copy of the entire transcript of record in said suit, including the proceedings in the Circuit Court of Appeals to which the writ of certiorari is asked to be directed, is herewith furnished together with the majority opinion of the Circuit Court of Appeals speaking through Honorable Walter H. Sanborn, and the dissenting opinion of Honorable Robt. E. Lewis, to be attached and made part of this application, marked "Exhibit A" in compliance with Rule 37 of this court.

I.

A statement of the nature of the cases by the court is found in Record 189, showing that a controversy arose of the respective rights and liabilities of the Burke

Construction Company, a corporation of the State of Missouri, on the one hand and on the other the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, John P. Kline, Milton Winham and Paul G. Huckins, who composed said Board, as members thereof and as individuals, all of whom are citizens of the State of Arkansas, under that certain contract between the Construction Company on the one hand and them on the other, dated November 29, 1916. On February 16, 1920, the Construction Company commenced an action at law in the United States District Court for the Western District of Arkansas to obtain an adjudication of that controversy, and sued for judgment against the Board and its members for a breach of contract, claiming damages in the sum of $114,331.60 (Record 50, 63).

Subsequently on March 19, 1920, the Board and its members brought a suit in equity against the Burke Construction Company, United States Fidelity & Guaranty Company, M. C. Burke and J. A. Burke, in the Chancery Court of Miller County, in the State of Arkansas, to obtain an adjudication of the rights and liabilities of the contesting parties upon a bond which was given by the Burke Construction Company for the faithful performance of the paving contract. The Board sought an accounting with reference to the work which had been done and which yet to be done under the contract and prayed for damages in the sum of $88,000 which it was alleged the Board had sustained by reason of the abandonment of the contract (Record 13-14).

In the suit of Burke Construction Company, pending in the United States District Court above mentioned, the Board of Improvement filed answer and cross-complaint, July 2, 1920, setting up a breach of contract by the Burke Construction Company and praying for damages on account of said breach for $99,498.36 (Record 64 to 106), and prayed for an accounting and transfer to the equity docket. There was a jury trial in said cause running from July 20th to July 29th, and the jury disagreed and were discharged (Record 125).

Thereafter the Board of Improvement gave notice to take depositions on the 30th day of August, 1920, to be used as evidence in the trial in the Chancery Court of Miller County, Arkansas, and then the Burke Construction Company filed a bill for injunction against the Board of Improvement further proceeding in the said Chancery suit (Record 10).

There was an answer filed to this bill setting up the fact that the suit brought by the Burke Construction Co. in the Federal Court was an action *in personam* and to recover against the sureties on the bond of the Burke Construction Company, and that the said Board had deferred proceeding in the state court until after the trial in the Federal Court in which the jury had failed to agree, and it was denied that the purpose of said suit in the Chancery Court was to interfere with the jurisdiction of the Federal Court, but it was an independent action to recover damages for a breach of contract and it involved additional parties, to-wit: the sureties on the bond (Record 11-21).

The case was heard upon the bill and answer, and Honorable Frank A. Youmans, the Judge of the District Court, denied the petition for the injunction (Record 22-23), and from that order the appeal was taken and first heard at Denver and subsequently in St. Louis, which resulted in a reversal of the judgment of the lower court and the order granting the injunction. The case of the Burke Construction Company against the Board of Improvement in the Federal Court and the Board of Improvement against the bond of the Burke Construction Company in the state court remain undetermined.

II.

No property has been seized or taken into custody by either court, and the actions in the Federal Court and State Court are for the recovery of money judgments arising out of a paving contract under which a part only of the work has been done.

III.

Your petitioners, feeling aggrieved by the foregoing disposition of said case in the Circuit Court of Appeals, now apply to this court for a review by a writ of certiorari and represent that the Circuit Court of Appeals erred in the following particulars, to-wit:

1. In holding that the Federal Court of the Western District of Arkansas had exclusive jurisdiction to hear and determine the controversy between the Burke Construction Company and the Board of Improvement.

arising out of said paving contract, and that the said court in which the subsequent action was brought, had no concurrent jurisdiction thereof as long as the Burke Construction Company insisted upon demanding a trial in the Federal Court.

2. The Court of Appeals erred in not holding that the state court had jurisdiction to proceed in the action for an accounting involving the work which had been done and that which was to be done, and in the ascertainment of damages sustained by the Board of Improvement on account of the abandonment of the work by the Burke Construction Company before it was half completed. The said Chancery Court's jurisdiction did not interfere with the jurisdiction of the Federal Court in the suit of Burke Construction Company against said Board on its claim for damages and for retained percentages. There was no evidence that the Board of Improvement was proceeding with undue haste, or in any manner except in an orderly way of presenting its claim to the state court having equity jurisdiction which was peculiarly adapted to the trial of this case with its involved and complicated accounts, and the said Board waited until after the plaintiff had had an opportunity in a long and tedious trial to have the case disposed of in the Federal Court, which resulted in nothing.

3. The Court of Appeals erred in holding that the Board of Improvement had no right to proceed in the state court against the sureties on the bond of the Burke Construction Company and in enjoining them from so

proceeding. The said bond was a part of the contract and the liability of the sureties are joint and several, and under the laws of Arkansas the suit could be maintained against any of them.

4. The Circuit Court of Appeals erred in holding that the Burke Construction Company had the right to the exclusive adjudication of the controversy in the Federal Court, and erred in holding that the suit upon the bond in the state court was an unlawful interference with said jurisdiction. The effect of said opinion is to overrule a settled line of decisions of the Eighth Circuit, particularly the cases of *Ogden City* v. *Weaver*, 108 Fed. 564; *Merritt* v. *Steel Barge Co.*, 79 Fed. 228; *Stewart Land Co.* v. *Arthur*, 267 Fed. 184; and in Seventh Circuit, *B. & O. R. Co.* v. *Wabash Ry. Co.*, 119 Fed. 678.

IV.

The reasons of gravity which your petitioners present for the review which they pray, are as follows:

It is shown by the bill of complaint which was filed in the Chancery Court of Miller County, Arkansas, on the 19th day of March, 1920, that the Burke Construction Company abandoned the work, and on account of the insolvency of the Burke Construction Company, the Board had no recourse except to fall back on the bond which was made by the United States Fidelity & Guaranty Company, M. C. Burke and J. A. Burke, the last two persons being residents of the district, and therefore a suit could not have been brought upon the bond

against all the sureties in the Federal Court for lack of diversity of citizenship. If the injunction is allowed to stand, the Board of Improvement will be denied the right to proceed and collect the liability upon the bond until the suit of the Burke Construction Company against the Board of Improvement, filed in the Federal Court, is finally disposed of, which may extend over a period of years. The Board of Improvement has been denied the right to proceed affirmatively in a court of its own selection having jurisdiction of the controversy.

V.

Your petitioners respectfully submit that questions concerning the scope of the jurisdiction, both original and ancillary, of the courts of the United States are peculiarly within the power of this court for determination, and that the questions presented in the present case have a novelty justifying their review by this court, in view of the divergent opinions of the respective judges in this cause, the first of whom in the District Court (Honorable Frank A. Youmans) was of the opinion that both the federal and state courts had concurrent jurisdiction; and also one of the judges of the Circuit Court of Appeals so held; thus two learned Federal judges held that the injunction should not have been granted, whereas two of the judges, who constituted a majority of the court at the time of the trial, held that the injunction should have been granted, and accordingly it was granted; and it is respectfully submitted that the majority opinion is not sustained by previous decisions of the Fed-

eral Court or the Supreme Court of the United States or the Circuit Court of Appeals.

Your petitioners further represent that this is not a cause where this court is without jurisdiction by reason of any right of review directly from the District Court, nor by reason of any failure of the Circuit Court of Appeals to certify questions to this court.

Your petitioners further are informed and believe that unless the writ of injunction herein is issued against the Burke Construction Company proceeding with the case now pending in the Federal Court for the Western District of Arkansas, or unless a supersedeas be issued suspending the effect and operation of the judgment of the Circuit Court of Appeals, that the said Burke Construction Company will forthwith proceed with the disposition of said case, and that the rights of said petitioners will be lost or greatly impaired, and petitioners are informed and believe that they are entitled to and should have an injunction from this Honorable Court preventing the Burke Construction Company from proceeding to the trial of its case in the Federal Court until this cause can be heard in the Supreme Court of the United States, or that it is entitled to a supersedeas suspending the operation and execution of said decree of the Circuit Court of Appeals until this cause can be heard and finally disposed of in this court.

Wherefore, because of the gravity and importance of the question involved, your petitioners respectfully pray that a writ of certiorari may be issued out of and

under the seal of this court directed to the judges of the Circuit Court of Appeals for the Eighth Circuit, commanding them and each of them to certify and send to this court on a day certain to be therein designated the full and complete transcript of the record of the proceedings of that court in this cause, and which was entitled in that court, Burke Construction Company, appellant, versus John P. Kline *et al.*, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, appellees, No. 5706, to the end that the judgment or decree of the Circuit Court of Appeals in said cause may be reviewed as provided in Section 240 of the Judicial Code and its amendments, and that your petitioners and each of them may have such other and further relief in the premises as to this court may seem appropriate and in conformity with the said provisions of the Judicial Code; and that the decree in the said Circuit Court of Appeals and every part thereof may be reversed by this Honorable Court. Your petitioners further pray that this Honorable Court issue an injunction against the Burke Construction Company proceeding with the trial of the cause in the District Court of the United States for the Western District of Arkansas until this petition for writ of certiorari can be heard and until the status of the parties with reference to said litigation may be determined and adjusted, and that a writ of supersedeas issue herein suspending and superseding the judgment of the Circuit Court of Appeals until this cause can be determined in the Supreme Court of the United States, and that your peti-

tioners stand ready to make such bond as may be required to secure such injunction and supersedeas.

Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas.

John P. Kline,
Milton Winham,
Paul G. Huckins,
As members of said Board, Petitioners.

By FRANK S. QUINN,
WILLIAM H. ARNOLD,
Attorneys for Petitioners.

WILLIAM H. ARNOLD,
Counsel for Petitioners.

State of Arkansas, County of Miller.

Frank S. Quinn, being duly sworn, says that he is one of the attorneys for the petitioners above named; that he has read the foregoing petition and knows the contents thereof and that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Frank S. Quinn.

Subscribed and sworn to before me this 6th day of May, 1921.

(Seal)

Guy H. Lambeth,
Notary Public, Miller County, Ark.

My commission expires July 10, 1923.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition, and in my opinion the said petition is well founded and the cause is one in which the prayer of the petition should be granted by this court.

WILLIAM H. ARNOLD,
Of Counsel for the Petitioners.

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

JOHN P. KLINE, MILTON WINHAM AND PAUL G. HUCKINS, AS THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20, OF TEXARKANA, ARKANSAS, PETITIONERS,

VS.

BURKE CONSTRUCTION COMPANY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF ERROR.

STATEMENT OF THE CASE.

The Burke Construction Company entered into a contract on the 29th of November, 1916, with the Board of Improvement of Paving Improvement District No. 20

of the City of Texarkana, Arkansas, and agreed and bound itself to put in, construct and complete the proposed improvements of said district at and for a unit price for each class of work to be done in the district, and agreed to furnish all materials, equipment and labor necessary to properly do said work according to the specifications attached and made a part of said contract. The work was to be completed within one year, but at the expiration of that time there was an extension given by the Board until November 1, 1918, and some work was done during said extended period, and the work still not having been completed at the end of that time, there was another extension made until November 1, 1919, and at the end of that time the Burke Construction Company quit work, although the work was not more than half completed. The Board was not required by the contract to grant either of said extensions, but did so voluntarily in order to aid and accommodate the Burke Construction Company and induce them to carry out their contract. The Board would have given an additional extension upon the same terms and conditions as before, after the expiration of the second extension, but the Burke Construction Company declined to enter into a contract for the additional extension, but moved its teams away from Texarkana, and thereafter on February 9, 1920, the Board took possession of said work and declared the contract at an end, as they had the right to do under a specific provision of the contract (R. 127-130).

To secure the fulfilling of said contract on the part of the Burke Construction Company, it executed and de-

livered to the said Board of Improvement its bond, dated the 29th day of November, 1916, in the sum of $300,000, conditioned that said plaintiff, the Burke Construction Company, would faithfully perform its contract to construct and put in the said improvements and paving in said Paving Improvement District No. 20, according to the contract and specifications and within the time specified; and the United States Fidelity & Guaranty Company of Baltimore, Maryland, and M. C. Burke and J. A. Burke, resident citizens of Fort Smith, Arkansas, signed said bond, and the sureties upon said bond agreed upon the extension of the time for the completion of said contract (R. 128). Burke Construction Company filed suit against said Board in the District Court of the United States for the Western District of Arkansas, February 16, 1920 (R. 24), alleging a breach of the contract on the part of the Board and claiming damages amounting to $85,250.84, and the said Burke Construction Company thereafter filed a substituted and amended complaint, and later filed a second amended and substituted complaint on April 27, 1920 (R. 37, 64), claiming the sum of $114,331.60 (R. 63) for an alleged breach of the contract by the Board of Improvement, and there is attached to the complaint twelve several separate accounts setting out specific claims (R. 51-64).

In the meantime the Board of Improvement, having taken over the work (February 9th, 1920) on account of its not having been completed by the Burke Construction Company within the extended period, filed a bill in the Chancery Court of Miller County, Arkansas, March

19, 1920 (R. 126, 146), against Burke Construction Company, United States Fidelity & Guaranty Company, M. C. Burke and J. A. Burke, upon the bond which had been given to secure the performance of said paving contract, showing the necessity for an accounting and setting forth a claim of $80,000.00 which it would cost to complete said work over and above the contract price. The grounds of equity jurisdiction is set forth in the bill (R. 32) as follows:

> "There is a conflict between the theories of the plaintiff and the defendant Burke Construction Company with reference to the kind and character of work and as to the materials to be used which the contract calls for, which involves the taking of much testimony and the statement of accounts upon the theory of each party upon practically every subject of said contract, including the character, quality and kind of curbing, guttering, the quantity and quality of gravel and the expense of preparing the same for use; the kind, quantity and quality of asphalt; asphalt macadam and brickwork; and in general there is a conflict between plaintiff and defendant upon many subjects arising under said contract and there will be much accounting required with reference to the amount which plaintiff is entitled to recover in order to complete said contract abandoned by the defendant as aforesaid."

At the May Term, 1920, of the Federal Court at Texarkana, the defendant, the Board of Improvement, in law case No. 439, filed certain motions to strike and motions to make more definite and certain, and a demurrer, which were disposed of by the court, and the second amended complaint was amended dismissing the

complaint as to the claim of individual liability by the members of the board, and thereafter the defendant Board filed its answer and counterclaim in case No. 439 (R. 64-116). (The date of filing answer and counterclaim was 1st day of July, 1920, date not shown by the record). And thereafter the Burke Construction Company filed a demurrer and reply to the counterclaim, on July 20, 1920 (R. 116-120). The trial of the case began on that date before a jury, resulting in a mis-trial and the jury were discharged. The United States Fidelity & Guaranty Company and M. C. Burke and J. A. Burke were not made parties to said case 439, and inasmuch as the members of the Board of Improvement are resident citizens of the Western District of Arkansas, and M. C. Burke and J. A. Burke were also resident citizens of said district, they could not have been brought into said case for the want of jurisdiction of the court to hear the controversy between them. After the mis-trial in the Federal Court, the Board of Improvement gave notice to the attorneys for the Burke Construction Company that it would proceed to take depositions to be read in evidence in the case pending in the Chancery Court in Miller County, and thereafter a bill of complaint was filed, August 24, 1920, in the District Court of the United States for the Western District of Arkansas to enjoin the Board of Improvement from taking said depositions. The petition for the injunction was presented to the Honorable F. A. Youmans, Judge of the said court, at Ft. Smith, Arkansas, on August 30, 1920, and was denied. The petition for preliminary injunction was presented to the Hon-

orable Circuit Court of Appeals for the Eighth Circuit sitting at Denver September 9, 1920, and was taken under advisement, and an injunction was issued by the said court in said cause October 2, 1920, restraining further proceedings in the Chancery Court until the case can be heard upon its merits. On the 4th day of November, 1920, the Board of Improvement filed a motion in the United States Circuit Court of Appeals praying that the court restrain the Burke Construction Company from proceeding with the trial of said case 439 in the United States Circuit Court until the bill for injunction herein can be heard upon its merits, and to modify the order heretofore issued herein so that the Board of Improvement may be permitted to proceed with the suit in the Chancery Court against the sureties on the bond. The board also on November 30, 1920, filed herein motion to advance this cause and to dismiss the bill of complaint, and that motion was overruled on the 9th day of December, 1920, and the motion to modify the injunction was postponed until the hearing of this cause, set for January 12, 1921.

ARGUMENT.

I.

Case No. 439 in the United States District Court for the Western District of Arkansas, Texarkana Division, Burke Construction Company vs. The Board of Improvement of Paving Improvement District No. 20, was an action in *personam* for a recovery on an alleged breach of contract. No property has been taken and no relief is sought except a plain judgment for money. The case of the Board of Improvement of said district against Burke Construction Company and the sureties on the bond for the performance of the work is also an action in *personam*, and no property has been seized, or involved; it is a suit for money for breach of contract.

The Circuit Court of Appeals for the Eight Circuit as early as March 1, 1897, committed itself to the doctrine that under these circumstances the state and Federal Court have concurrent jurisdiction, and it is immaterial which case was filed first, and comity does not prevent each court from asserting its own jurisdiction to dispose of the case upon its merits. In the case of *Merritt* v. *American Steel Barge Co.*, decided by the Circuit Court of Appeals for the Eight Circuit, Caldwell and Thayer, Judges sitting, 79 Fed. 228, Judge Thayer, speaking for the court, said:

> "It does not follow, however, that the rule of comity to which we have referred operates to pre-

vent a court from taking jurisdiction of a cause in all cases where a prior suit involving the same issue or issues has been commenced in some other forum, and jurisdiction has been acquired by such other court over the parties litigant. Whether the pendency of a prior suit has such effect depends, as Mr. Justice Miller remarked, in substance, in *Buck* v. *Colbath*, 3 Wall. 334, 335, upon the character of the prior suit, the nature of the remedy and the relief sought, and the identity of the parties. If the prior action does not deal either actually or potentially with specific property or objects, but is strictly a suit in *personam*, in which nothing more than a personal judgment is sought, no reason is perceived why a subsequent action may not be brought and maintained in another jurisdiction, although it involves the determination of the same issue or issues on which the right to recover in the first suit depends. The bringing of such second suit, under the circumstances supposed, does not oust the court in which the first suit was instituted of its jurisdiction, or delay or obstruct it in the exercise of its jurisdiction, or lead to a conflict of authority, where each court acts in accordance with well established rules of law. Although a judgment may be rendered in the second suit before the first suit is tried, and may be pleaded in bar in the latter suit because the issue and the parties to the two suits are the same, yet it has never been supposed that the fact that a judgment of another court is offered in evidence to conclude the parties on a given issue or issues either defeats or impairs its jurisdiction, or has any necessary tendency to occasion a conflict of authority. Whatever doubt we might otherwise entertain concerning the question whether the pendency of a suit strictly in *personam* has the effect of preventing a party to that suit from subsequently bringing a suit in another jurisdiction involving the same issue, and from pleading the judgment there recovered as an

estopped in the former action, is resolved by the fact that in a number of cases such practice has been sanctioned by the highest authority."

The court then cited the following decisions of the Supreme Court of the United States in support of the opinion:

Stanton v. *Embrey*, 93 U. S. 548.
Insurance Co. v. *Harris*, 97 U. S. 331.
Buck v. *Colbath*, 3 Wall. 334.
Standley v. *Roberts*, 19 U. S. App. 407, 59 Fed. 836.

Judge Thayer in said case further said:

"And in the case of *Sharon* v. *Terry*, 36 Fed. 337, where a suit had been brought in the federal court to compel the surrender and cancellation of a paper purporting to be a written declaration of marriage, and to restrain the use thereof on the ground that it was a forgery, and a suit for divorce had subsequently been brought in a state court, wherein the writing was found to be genuine, Mr. Justice Field declined to recognize the latter adjudication; holding that, as the federal court had first acquired jurisdiction of the controversy to compel the surrender and cancellation of the forged document, it was not bound to adopt the finding of the state court that the document was genuine."

In the case of *Ogden City* v. *Weaver*, decided by the Circuit Court of Appeals for the Eighth Circuit, April 20, 1901, 108 Fed. 564, Judges Caldwell, Sanborn and Thayer sitting, it was said:

"It is urged, however, in behalf of the defendant city that if the decree which it had secured in the state court is interlocutory and not final, and

for that reason cannot be invoked in support of its plea of *res judicata*, nevertheless the mere pendency of the case in the state court should have induced the trial court to suspend all proceedings in the case at bar until the action in the state court was finally heard and determined. This contention, however, is based upon a misconception of the character of the present proceeding, which is an action at law, in *personam*, to recover a sum of money due under a contract. It is not a case which affects the custody of any property over which the state court has first acquired jurisdiction. Neither is it a case which involves any interference with the orderly conduct of the litigation in the state court. It is simply one of those cases such as frequently occur, where a state court and a federal court, in the exercise of a jurisdiction which rightfully belongs to each, are called upon to determine the same question, and the fact that they may disagree and decide the question differently in no wise interferes with the right of either to proceed. It is well settled that the fact that a suit upon a cause of action is pending in a state court will not sustain a plea of *lis pendens* to a suit upon the same cause of action subsequently filed in a federal court. *Stanton* v. *Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Insurance Co.* v. *Harris*, 97 U. S. 331, 24 L. Ed. 959; *Buck* v. *Colbath*, 3 Wall. 334, 345, 18 L. Ed. 257; *Standley* v. *Roberts*, 19 U. S. App. 407, 421, 8 C. C. A. 305, 59 Fed. 836. The rule is quite different, of course, when, after a suit is brought in a state court which affects the custody of property, or at some stage of the proceeding may affect its custody a suit of a like nature is subequently brought in a federal court. In such cases the rule is well established that the court which first acquires jurisdiction of the *res*, actual or constructive, is entitled to proceed without let or hindrance on the part of any other court of co-ordinate jurisdiction.

Merritt v. *Barge Co.*, 49 U. S. App. 85, 24 C. C. A. 530, 79 Fed. 228; *Zimmerman* v. *So Relle*, 49 U. S. App. 387, 25 C. C. A. 518, 80 Fed. 417; *Gates* v. *Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961."

In the case of *W. E. Stewart Land Co.* v. *Arthur*, 267 Fed. 184, decided August 23, 1920, Judges Hook Stone and Lewis sitting, it was said:

> "In the Iowa case there was no custody of property which might lawfully be protected by the injunctive process. It was purely in *personam*. The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course. See *Barker Asphalt Co.* v. *Morris*, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761. The prohibition of injunctions by courts of the United States staying proceedings in state courts extends to all steps in the progress of a cause. This obviously includes the taking of depositions. Otherwise a case might be effectively halted at the start or brought to failure."

In the case of *Woren* v. *Witherbee, Sherman & Co.*, 240 Fed. 1013, Judge Ray of the District Court of N. D. New York, after a very thorough research of the federal authorities, said:

> "In each case the defendant asserts that it should not be harassed by the pendency of a case in the state court and also the pendency of a case on the same cause of action in the United States Court, and that the plaintiff, he having first sued in the state court, should either discontinue in the state

court or be enjoined by the U. S. District Court from prosecuting the case in such District Court until a trial, determination and judgment in the state court. But both courts have jurisdiction of this cause. If the federal court enjoins the plaintiff in its own court from proceeding further, it is refusing to exercise its own power and jurisdiction and in effect surrendering it to the state court. This the federal court cannot do, unless there is property or property rights involved which is the subject matter of the litigation and custody of which is in the state court. As I understand the rule when there is *res*, and the one court having jurisdiction has taken possession (in effect) of that *res* and is proceeding to hear the case and adjudicate regarding it, the other court of concurrent jurisdiction will not exercise its jurisdiction regarding or over that subject matter as to the same question."

We submit the following additional authorities to sustain the proposition that an action in a state court in *personam* which involves no claim to or lien upon specific property in the possession of, or under the dominion of a national court, will not be enjoined by a federal court which also has concurrent jurisdiction of a suit involving the same matter:

Barber Asphalt Paving Co. v. *Morris*, 132 Fed. 948.

Gates v. *Bucki*, 53 Fed. 961.

Zimmerman v. *So Relle*, 80 Fed. 417.

Standley v. *Roberts*, 59 Fed. 836.

McClellan v. *Carland*, 217 U. S. 268.

Defiance Water Co. v. *City of Defiance*, 100 Fed. 178.

In re Lasserot, 240 Fed. 325.

In the case of *Baltimore & Ohio Ry. Co.* v. *Wabash Ry. Co.*, 119 Fed. 678, decided November 11, 1902, by the Circuit Court of Appeals for the Seventh Circuit, Circuit Judge Jenkins rendering the opinion, it is said:

> "Where a suit is strictly in *personam*, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law. *Stanton* v. *Embrey*, 93 U. S. 548, 23 L. Ed. 983; 8 Rose, Notes, 1010. The doctrine is lucidly stated by Judge Thayer in *Merritt* v. *Steel Barge Co., supra.*"

In Corpus Juris, Volume 1, beginning at page 15, the title "Abatement and Revival," appears, and the sub-title, "Another Action Pending" appears at page 45. Under that sub-title the following principles are stated:

> "Section 110. The rule that a subsequent action may be abated by the pendency of a prior one between the same parties for the same cause is confined, both at law and in equity, to those cases in which the former action is pending in a court of the same state or government, and does not apply where such former action was commenced and is pending before the court of a foreign or different jurisdiction."

> "Section 122. It is now well settled as a general rule that the pendency of a prior suit in a state court is not a ground for abatement of a subsequent suit in the federal court, although the prior suit is between the same parties and for the same cause; nor is the

pendency of a suit in the federal court ground for abatement of a like suit in the state court. And this rule applies according to the weight of authority, even though the courts are in the same state and the state court is within the district covered by the jurisdiction of the federal court."

"Section 127. Of course, aside from any question as to the difference of jurisdictions, and under the general rules applicable in other cases, pendency of an action in the federal court is not ground for abatement of a subsequent action in a state court, or *vice versa*, where there is not the necessary identity of causes of action, issues and parties, or where the relief sought and obtainable is not the same."

In 15 Corpus Juris, at pages 1163 to 1165, under the heading "courts," are laid down the limitations to the rule that the court first acquiring jurisdiction of a cause retains the same to the exclusion of other courts. Exclusive jurisdiction applies only where the parties to, the subject matter of, and the relief sought in the second suit are the same, so that if the first suit had already been disposed of the judgment therein should be treated in bar as a former adjudication. In support of this a great number of decisions from the United States Courts are cited under note 67. The further exception is also made that exclusive jurisdiction does not attach where one suit is at equity and the other at law. And the rule is limited to actions which deal either actually or potentially with specific property or objects; and where a suit is strictly in *personam*, nothing more than a personal judgment being sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, al-

though the same issues are to be tried and determined. Under notes 74 to 76, at page 1165, are found the federal decisions on these points.

II.

The opinion of the Circuit Court of Appeals seems to concede that the plaintiff after bringing suit in a Federal Court may subsequently bring another action in a state court, and that both courts may proceed concurrently. The court, however, holds that a defendant who is brought into a Federal Court will not be permitted to bring an independent action in a state court against the plaintiff which involves a part of the subject matter of the plaintiff's complaint. The Circuit Court of Appeals of the Eighth Circuit, however, had previously decided this very question the other way in the case of *Merritt* v. *American Steel Barge Co.*, 79 Fed. page 234, in which the following language is employed:

> "In the case of *Sharon* v. *Terry*, 36 Fed. 337, 359, 360, it was conceded by Mr. Justice Field that a plaintiff has a right to sue on the same cause of action in different jurisdictions, where nothing more than a personal judgment against the defendant is demanded; and, if such be the law, we can see no sufficient reason for denying the right of a defendant who has been sued in one jurisdiction for the recovery of a personal judgment against him, to bring an action against the plaintiff in another jurisdiction, although that action is of such nature that it may require a determination of the same issue which is involved in the first suit * * *"

III.

The Board of Improvement of Paving Improvement District No. 20; Texarkana, Arkansas, shows to the court that cause No. 439, of the Burke Construction Company against the Board pending in the District Court of the United States for the Western District of Arkansas, is a suit for damages arising out of the alleged breach of contract against said Board, which said Board is contesting, and that said Board has filed its counterclaim in said cause against the Burke Construction Company for breach of contract in failing to complete said pavement by said Burke Construction Company.

The bill pending in the Chancery Court of Miller County, Arkansas, involves other parties, to-wit: United States Fidelity & Guaranty Company, M. C. Burke and J. A. Burke, who are jointly and severally liable to the Board of Improvement upon said bond given by the Burke Construction Company for the completion of said contract, and said case involves an accounting which should result on a trial in a judgment against the bond, jointly and severally, for the difference between the contract price of said work and the amount required to complete said work at the time the said contract was broken by the Burke Construction Company, March 16, 1920, and it involves an accounting as to whether or not the board is entitled to the retained percentages as a credit upon said indebtedness. The questions arising upon said accounting are various and complex, and a trial of said cause before a jury is impracticable.

The parties and the issues in said cases are different, especially insofar as the sureties are concerned, who are themselves as much liable for the performance of said contract as the Burke Construction Company itself; said bond in express terms makes the contract for paving a part of the obligation of the bond.

The allegations of the bill for an injunction against the board that the said bill was filed in the Chancery Court for the sole purpose of depriving the United States District Court of jurisdiction of case No. 439, is sustained by no facts, and it presents a question of law only as to its insufficiency. The question is simply whether or not the two courts have concurrent jurisdiction, and, if so, the Board of Improvement had the right to file the bill in the Chancery Court upon the bond for the collection of the liability thereon, and it was not a legal fraud upon the jurisdiction of the Federal Court to do so. The allegation of fraud in general terms presents nothing to the court, as shown in an opinion by Mr. Justice Lurton, speaking for the Supreme Court of the United States in case of *Rock Island & Pacific Ry. Co. et al., Plaintiffs in Error* v. *Dowell*, 229 U. S. 102-114.

And the opinion of the same court by Mr. Justice Holmes in *Chicago, R. I. & P. R. Co.* v. *Schwyhart*, 227 U. S. 184-194, in which it is said:

> "If there is a joint liability, he (the plaintiff) has absolute right to enforce it, whatever the reason that makes him wish to assert that right."

It is seen that whatever judgment may be rendered in case No. 439, in the Federal Court, that no decision can

be rendered which would be final or binding upon the sureties upon said bond. No execution could be issued against the sureties upon said bond on any judgment which may be rendered in the Federal Court in a case to which they are not parties, and said sureties have presented a different defense in the Chancery Court from that of the Burke Construction Co., and are claiming that they have been released from liability by certain actions of the board, in agreeing to the extensions of the contract, and for other reasons set out in said answers. Moreover, it is alleged in the bill of complaint in the Chancery Court, as well as in the counterclaim filed by the board in the Federal Court, that the Burke Construction Company is insolvent, and therefore a judgment against said company in favor of the board would be uncollectible should the injunction herein prayed for be granted and perpetuated, the Board of Improvement would be deprived of collecting the bond, or at least postponed until the end of the litigation in cause No. 439, which may be extended through a period of years.

It is the contention of the board that the sureties on the bond will not pay any judgment which may be recovered against the Burke Construction Company in the Federal Court, and that said sureties cannot be bound to pay the same, and that whatever judgment may be rendered in said cause 439 will not be *res judicata* as between the Board of Improvement and the said sureties on the bond.

The contract and bond sued upon by the Board of Improvement in the equity case are obligations entered into and existing under the laws of the State of Arkansas.

Section 5719 of Kirby's Digest, under the heading "Municipal Corporations" and sub-heading, "Improvement Districts," provides:

> "All contractors shall be required to give bond for the faithful performance of such contracts as may be awarded them with good and sufficient securities in double the amount of the contract work, and the Board shall not remit or excuse the penalty or forfeiture of said bond or the breaches thereof. They may appoint all necessary agents for carrying on the work, and may fix their pay. They may buy all necessary material and implements, and may sell any such material or implements as may be on hand, and which may not be necessary for the completion of the improvement under way, or which may have been completed; and may, in general, make all contracts in the prosecution of the work as may best subserve the public interest."

By virtue of the Statutes of Arkansas, the bond sued on in the equity case is a general and several obligation. Section 4420 of Kirby's Digest of the Statutes of Arkansas, provides:

> "Joint obligations shall be construed to have the same effect as joint and several obligations, and may be sued on, and recoveries had thereon in like manner."

Under the heading "Pleading and Practice," Kirby's Digest, Sections 6009 and 6010 provide:

> "Section 6009. Persons severally liable upon the same contract, including parties to bills of exchange, promissory notes, common orders and checks, and sureties on the same or separate instru-

ments, may all, or any of them, or the representatives of such as may have died, be included in the same action, at the plaintiff's option."

"Section 6010. Where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option. Where any of the persons so bound are dead, the action may be brought against any or all of the survivors, with the representatives of all or any of the decedents, or against the latter or any of them. Where all the persons so bound are dead, the action may be brought against the representatives of all, or of any of them. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the other."

Sections 6229, 6230 and 6232, provide:

"Section 6229. Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants."

"Section 6230. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper."

"Section 6232. Though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants if the action had been against them alone."

The Board of Improvement, upon the contract and bond given to it by the Burke Construction Company, is entitled to maintain a joint suit against all of the obligors, or a separate suit against any one or more. The settled

rule in Arkansas is that a judgment against or in favor of one obligor is not available against or in favor of another obligor sued in a separate action.

We cite the case of *State Bank* v. *Robinson*, 13 Ark. 214, in that case a bond was executed by John Brown as principal, and the defendants as securities. One of the defendants, Waddell by name, pleaded in bar of the action that the State Bank had sued the principal Brown for the breach of the same identical obligation, in which suit Brown had interposed pleas of payment and accord and satisfaction, and judgment had been rendered in Brown's favor. This court will notice that the effect of the defendant's plea was that the principal having been acquitted of liability upon the bond, this necessarily released the sureties from liability. The Supreme Court of Arkansas said:

> "It would seem that under the application of these general rules, without going any further into the doctrine of estoppel, and the case before the court does not require it, the bar attempted to be set up by the plea of the defendants is not available to them. And it is to be observed that under the construction given to our statute making all obligations joint and several, and authorizing a party having a cause of action against several persons and entitled by law to but one satisfaction, to sue all jointly, or as many of them as he may think proper, it is in the power of the plaintiff, by bringing separate suits to deprive each defendant of the bar arising from a recovery by another defendant * * *."
>
> "While the true reason and policy of the statute are to enable the plaintiff to recover against such of the defendants as are liable to him, without regard to the joint character of the undertaking, its effect

must also be that the same matter is examinable in each separate suit. * * * Probably the fair construction of the statute would be that the bar of the former recovery is available to the party who was discharged upon a trial of the merits of the same matter in a former suit, without regard to whether either action was in form joint or several. But in no event would the estoppel be available to the party pleading it unless he was a party to the former suit."

The court then proceeds to say:

"The plea, however, in this case was evidently interposed upon the supposition that the principal debtor having been discharged by a general verdict and judgment upon pleas of payment and accord and satisfaction, and his liability being thereby extinguished, it followed as a necessary consequence that the liability of the sureties was also extinguished. And it remains the inquire whether there is anything in the nature of the contract here sued upon which would give that effect to a judgment in favor of the principal debtor. The idea seems plausible enough, but we cannot find that it has any foundation in law. Though the relation of principal and security may exist between the co-obligors, yet so far as the obligee is concerned, they are all principals; in other words, it is an original undertaking on the part of all, and they are all equally bound to performance. They are not mere guarantors that the principal will pay; their liability is not merely consequential upon his failure to do so, but they are primarily liable for the debt. Such is the legal effect of the contract, and so far as the modifications of it in equity are to be regarded as exceptions, they go to establish the general rule."

On the question of privity between the principal and the surety, the court said:

"Nor is there any such privity between the co-obligors, or between principal and surety as would sustain the plea here interposed. An incident to the doctrine of estoppel is that the estoppel binds not only the parties, but their privies, that is, those who succeed and represent them, and the privy is supposed to stand in the place of the party, and for all the purposes of the estoppel is regarded as the party himself. The administrator, the heir, the assignee, are in privity with the intestate, the ancestor, the assignor, and therefor take the benefit as it was charged with any burden in the hands of him whom they represent. There may be a joint interest or a community of interest in the subject matter of a contract between the parties, but it is not that privity or succession to which the estoppel applies. The strongest illustration of union and identity of interest is that subsisting between co-partners. Their contracts are not only necessarily joint, but there is a mutual agency, as to all matters within the scope of the partnership. But the case of *Barkman* v. *Hopkins*, 11 Ark. 160, is decisive of the question whether a co-partner is estopped by a judgment against the firm, in a suit to which he was not a party. There the point was whether, under the facts alleged, Barkman had notice so as to make him a party, but it was not argued or supposed that he was estopped by the judgment unless he was a party."

The court further says, at page 221:

"But if it be argued that, in the case before the court, the obligation of the surety was only an undertaking for the principal that he would pay the money, and that the surety is discharged by an adjudication that he does not owe it, in order for that to be so, it necessarily follows that the surety would be estopped from denying that he is liable by the same judgment, if it had been against the principal and in a suit to which he (the surety) was

not a party, of which he had no notice, into which he could not obtrude himself for the purposes of contesting, and from which he had no right to appeal —a startling proposition so far as the right of sureties is concerned."

The court concludes its opinion, at page 224, by making the following statement:

"The cases cited on this point for the defendants in error, go to establish the general doctrine, that a judgment is an estoppel to the parties to it and their privies, but it is nowhere intimated that there is such privity between the co-obligors as makes a judgment for or against one an estoppel against the creditor of another of the obligors not a party to the former suit."

This case, as far as counsel for petitioners have been able to learn, has not been distinguished, differentiated, nor overruled, and the principles announced are the well settled law of the State of Arkansas. The bringing of a joint suit against all or a separate suit against one or more co-obligors is familiar practice to our lawyers and courts.

In the annotation to the case of *Galt* v. *Hildreth*, 3 American Law Reports, page 114, beginning at page 124, under the title, "View that Judgment is not a Bar," the annotator states:

"In several jurisdictions the view obtains that a judgment in favor of less than all of the parties to a contract does not bar an action against the others on the same cause of action." Citing, among other cases, *Lavison* v. *Hager*, 14 Fed. 49, and *State Bank* v. *Robinson*, 13 Ark. 214.

In note to *Sully* v. *Campbell* (Tenn.), 43 L. R. A. 161, under the heading, "Where the Obligors are Principal and Surety," at page 165, the following statement is made:

> "But the following cases hold that a judgment against one obligor is not a bar to a subsequent suit or proceeding against the remaining obligors in matters of principal and surety, where the contract is joint and several." Citing, among other cases, *State Bank* v. *Robinson*, 13 Ark. 214.

It appears, from the foregoing rule in force in Arkansas, that the equity suit in the state court will at some time have to be tried; that the issues in that case will have to be examined again, and that a judgment in the law case, to which the sureties in the equity case are not parties, cannot be used by or against the sureties in the equity case.

IV.

The dissenting opinion of Judge Lewis (R. 214-16).

It is respectfully submitted that the opinion of judge Lewis, who sat in the trial of this case, is a correct statement of the law as applied to the present case. He said:

> "Taking the two proceedings as both in *personam*, I admit at once that the jurisdiction of the Federal Court in the law action cannot be ousted or obstructed by the suit in equity brought later in the State Court; and I think an admission to the converse is equally necessary, that the jurisdiction of the State Court; cannot be ousted or obstructed by the prior action in the Federal Court. Each party had a right to invoke, by appropriate procedure, the jurisdiction of the tribunal to which he appealed, and I do not conceive that the right of one is any greater

in that respect than that of the other. Each is a suitor before a court with plenary power to decide the one controversy, and there is no presumption that one will decide it better, or more justly, than the other. Jurisdiction is the right and power to hear, consider and determine a controversy between parties litigant. How, then, does the exercise of that power by the State Court interfere with or impede the exercise of the same power by the Federal Court? The same right, duty and power is lodged in each, it is concurrent, and when exercised by one the controversy is at an end. There would then be no longer a cause in which the power could be exerted, and there could be no conflict or interference. The controversy would become *res adjudicata*, and the parties plaintiff had an equal right to proceed until that end was reached. I understand this to be the rule of comity which came out of the necessities of our dual system, and which, it is said, ripened long ago into a principle of right and law. I had believed that this court had firmly announced its adherence to the rule in *Merritt* v. *Steel Barge Co.*, 79 Fed. 228."

He then proceeded to quote from other decisions of the United States Circuit Court of Appeals for the Eighth Circuit; *Ogden City* v. *Weaver*, 108 Fed. 564; *Stewart Land Co.* v. *Arthur*, 267 Fed. 184.

His argument seems to be clear and convincing. It is therefore respectfully submitted that the writ of certiorari should be granted.

FRANK S. QUINN,
WILLIAM H. ARNOLD,
Attorneys for the Petitioner.

WILLIAM H. ARNOLD,
Counsel.

Texarkana, Arkansas, May 6, 1921.

IN THE SUPREME COURT OF THE UNITED STATES.

In the matter of the petition of John P. Kline, Milton Winham and Paul G. Huckins as the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, for writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit to bring before the Supreme Court of the United States the case of:

John P. Kline, Milton Winham and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas,

vs.

Burke Construction Company.

And now come the petitioners herein, John P. Kline, Milton Winham and Paul G. Huckins as the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, and move the court upon certified copy of the Transcript of the Record herein and upon the annexed petition duly sworn to for writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit to bring before this Honorable Court the above styled case decided by the United States Circuit Court of Appeals for the Eighth Circuit, for such proceedings therein as to this court may seem just, and for such other and further relief as may be just.

FRANK S. QUINN,
WILLIAM H. ARNOLD,
Attorneys for the Petitioners.

I acknowledge receipt of copy of the above and foregoing petition, motion, notice, and brief, all of which have been delivered to me this....day of May, 1921.

.....

.....

INDEX.

Page

Statement of the Case 1

Bill for Injunction 5

Answer to the Bill showing that cause No. 692, Board of Improvement vs. Burke Construction Company, United States Fidelity and Guaranty Company, M. C. Burke and J. A. Burke, involves different issues and relief sought from that of Federal Court case No. 439 6

Separate Answer of the United States Fidelity and Guaranty Company, claiming that it is released on account of material changes in the work contemplated by the specifications and bond . . 13

Assignment of Errors 15

Argument showing that the law case in the Federal Court, Burke Construction Company vs. John P. Kline et al., and the case pending in the Chancery Court of Miller County, Arkansas, John P. Kline et al. vs. Burke Construction Company and the sureties on the bond may proceed concurrently, and that the chancery case does not conflict with the jurisdiction of the Federal Court, both actions being in personam, and no property being involved 19

Discussion of Opinion of Circuit Court of Appeals by Judge Sanborn 23

The Dissenting opinion of Judge Lewis 25

Argument that Section 265 of Judicial Code applies forbidding issuance of injunction 26

Page

Argument that the Board has been denied the equal protection of the laws and the privileges and immunities of a citizen guaranteed by the Constitution in the issuance of said injunction.... 27

Argument that opinion of Court of Appeals is erroneous in granting to a plaintiff the right to sue in all courts while denying the same right to a defendant when sued in the federal court 29

The Case of Holmes County vs. Burton Construction Company, 172 Fed. 554 29

Opinion of Circuit Court of Appeals in conflict with previous decisions of said court 32

Decisions of Other Circuit Courts of Appeals and District Courts 38

Pendency of an Action in the Federal Court is not ground for abatement of a subsequent action in a state court, or vice versa, where there is not the necessary identity of causes of action, issues and parties, or where the relief sought and obtainable is not the same 42

Whatever Judgment may be rendered in said Cause No. 439 will not be res judicata as between the Board of Improvement and the Sureties on the Contractor's Bond 45

Suit in State Court was not for the purpose of interfering with the Jurisdiction of the Federal Court, and is not a legal interference with the rights of the Burke Construction Company.. 52

Cases Cited.

	Page
Baltimore & Ohio Ry. Co. vs. Wabash Ry. Co., 119 Fed. 678	38
Barber Asphalt Paving Co. vs. Morris, 132 Fed. 948	37
Bellamy vs. St. Louis I. M. & S. Ry. Co., 240 Fed. 876	23
Buck vs. Colbath, 3 Wall. 334-347, 70 U. S.	23, 35, 44
Bunker Hill etc. vs. Shoshine etc., 109 Fed. 504-508	38
Chicago Rock Island & P. R. Co. vs. Schwyhart, 227 U. S. 184-194	52
City of Mankato vs. Barber Asphalt Paving Co., 142 Fed. 340	38
Corpus Juris, Volume 1, pages 15, 45	40
Corpus Juris, Volume 15, Pages 1163-1165	41
Defiance Water Co. vs. City of Defiance, 100 Fed. 178	40
Gates vs. Bucki, 53 Fed. 961	37, 38
Gordon vs. Gilfoil, 9 Otto, 168-179, 99 U. S.	22
Greene vs. Underwood, 86 Fed. 429	38
Harton vs. Hawley, 155 Fed. 492	40
Holmes County vs. Burton Construction Co., 172 Fed. 554-566	29, 45
Hunt vs. New York Cotton Exchange, 205 U. S., 322-339	23, 45
In re Lasserot, 240 Fed. 325	40
Judicial Code, Sec. 265	26
Kirby's Digest of the Statutes of Arkansas, Sections 5719, 4420, 6009, 6010, 6229, 6230, 6232	46

Page

Leonard Covell vs. Sarah Heyman, 111 U. S., 176-185 20

McCellan vs. Carland, 217 U. S. 268 40

Merritt vs. American Steel Barge Co., 79 Fed. 228 . . . . . 26, 29, 33

Mutual Life Ins. Co. vs. Harris, 6 Otto, 588-593, 96 U. S. 21

Ogden City vs. Weaver, 108 Fed. 564 35

Rock Island & Pacific Ry. Co. et al. Plaintiffs in Error vs. Dowell, 229 U. S. 102-114 52

St. L. I. M. & S. Ry. Co. vs. McKnight et al. Railroad Commrs. of Arkansas, 244 U. S. 368 . . 23

St. Louis I. M. & S. Ry. Co. vs. Bellamy, 211 Fed. 173 23

Section 1, 14 Amendment and Section 2, Article 4, Constitution of United States 27

Sharon vs. Terry, 36 Fed. 337 . . . . . 29, 35

Standley vs. Roberts, 59 Fed. 836 . . . . . 33, 35

Stanton vs. Embrey, 3 Otto, 548-558, 93 U. S. . . 22, 35

State Bank vs. Robinson, 13 Ark. 214 48

W. E. Stewart Land Co. vs. Arthur, 267 Fed. 184 37

Woren vs. Witherbee, Sherman & Co., 240 Fed. 1013 39

Zimmerman vs. SoRelle, 80 Fed. 417 . . . . . 37, 38

No. 321.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

JOHN P. KLINE, MILTON WINHAM AND PAUL G. HUCKINS AS THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT No. 20 OF TEXARKANA, ARKANSAS, PETITIONER,

VS.

BURKE CONSTRUCTION COMPANY, RESPONDENT.

BRIEF OF PETITIONER.

STATEMENT OF THE CASE.

The Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, filed a petition on May 12th, 1921, for a writ of certiorari from the Supreme Court of the United States to the United States

Circuit Court of Appeals of the Eighth Circuit and the same was granted, and the return thereon was filed in said court on June 27th, 1921, in order that a decree of the United States Circuit Court of Appeals of the Eighth Circuit may be reviewed and set aside in the case of the Burke Construction Company, appellant vs. John P. Kline, Milton Winham and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, enjoining said Board of Improvement from further proceeding in the prosecution of suit No. 692 pending in the Chancery Court of Miller County, Arkansas, instituted by said board against the Burke Construction Company and the sureties upon a certain bond given by said Burke Construction Company to the said board for the completion of a certain paving contract in the City of Texarkana, Arkansas. The sureties on the bond who were made defendants in said suit are the United States Fidelity and Guaranty Company of Baltimore, Maryland, M. C. Burke and J. A. Burke of Fort Smith, Arkansas. The opinion of the court rendered by Circuit Judge Sanborn appears in the Federal Reporter, Volume 271, page 605 (R. 171-179). In that case the decree of the lower court rendered by the Honorable Frank A. Youmans, judge of the District Court of the United States for the Western District of Arkansas, Texarkana Division, was reversed; the District Court having dismissed the bill for injunction as being without merit (R., 19). The United States Circuit Court of Appeals of the Eighth Circuit in reversing the judgment directed the District Court from which

the appeal was taken to enjoin the Board of Improvement from proceeding with its suit in said Chancery Court of Miller County, Arkansas (R. 179). Judge Robert E. Lewis of the District Court of Colorado, who sat in said court, rendered a dissenting opinion, to which reference will be made in argument (R. 179). No evidence was introduced at the hearing of said petition for injunction, but the said case was heard on the bill, answer and exhibits thereto (R. 21).

The Burke Construction Company entered into a contract on the 29th day of November, 1916, with the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, and agreed to construct certain paving, curbing and guttering in said district within one year. The work has never been completed although the board of improvement granted two extensions of one year each, but the construction company quit the work after it had been about half completed and brought suit against said board of improvement on the law docket in cause No. 439 in the District Court of the United States for the Western District of Arkansas, claiming that the Board had breached the contract and that said Construction Company had thereby suffered damages in the sum of $114,331.00. The Board of Improvement filed answer and counter claim denying that it had broken the contract, but alleged that the Burke Construction Company was at fault in not completing the work, and said Board claimed damages for the non-completion of the work in the sum of $99,498.36 (R. 89), said answer being filed July 2nd, 1920.

On March 19th, 1920, said Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, brought suit, No. 692, in equity, in the Chancery Court of Miller County, Arkansas, against the Burke Construction Company, United States Fidelity and Guaranty Company, M. C. Burke and J. A. Burke to obtain the adjudication of the rights and liabilities of said parties to said bond, and prayed for an accounting with reference to the work which had been done and which yet had to be done under the contract, and prayed for damages against said bond on account of the non-completion of said work in the sum of $80,000.00 (R. 112). This action in the Chancery Court was enjoined by the decree of the United States Circuit Court of Appeals of the Eighth Circuit as above shown on the ground that the District Court of the United States for the Western District of Arkansas had exclusive jurisdiction of said cause.

The undisputed facts are that the action in the Federal court and in the State Court are *in personam*, each involving a claim for money due on account of breach of the same contract; no property has been seized or taken into custody by either court.

Moreover, the suit in the State Court invokes the aid of a Court of Chancery for an accounting in the settlement of a vast number of disputed and complex accounts, and the suit is against sureties on the bond who are not parties to the cause No. 439, pending in the Federal Court, and two of them cannot be made parties because they are residents of the same district with the

Board of Improvement. The injunction stops the suit not only against the Burke Construction Company in the State Court, but prevents said Board from suing on the bond. The pleadings upon which the decision rests will be hereinafter summarized.

The Bill for Injunction.

The Burke Construction Company in its bill of complaint filed in the United States District Court for the Western District of Arkansas August 24th, 1920, alleged that on the 16th day of February, 1920, it instituted a suit in the United States District Court for the Western District of Arkansas, Texarkana Division, alleging a breach of contract by the defendant, dated November 29th, 1916, under which the Burke Construction Company agreed to pave certain streets in the City of Texarkana, Arkansas; that after the original suit was brought the plaintiff amended its complaint, and asked for damages for the breach of contract in a sum in excess of $100,000.00; that the defendant appeared in said action in the said Federal Court, which was on the law side of the docket and filed numerous motions and demurrers to the complaint, some of which were sustained and the complaint amended, and some of which were overruled finally resulting in said defendant filing in said cause its answer on the law side of said suit No. 439, and the cross complaint on July 2nd, 1920, and plaintiff attached to its bill a copy of said complaint at law and the answer and cross complaint filed by defendant in said case.

It was further alleged in the bill that said law case No. 439 was tried on the 20th day of July, 1920, which resulted in a mistrial after more than a week had been consumed in the introduction of testimony in the trial of said cause (R. 5). The said plaintiff, Burke Construction Company, further alleged in its bill that the defendant in said cause, to-wit, the said Board of Improvement, for the purpose of harassing, injuring and annoying the plaintiff, and for the purpose of depriving the Federal Court of its jurisdiction to hear and determine the case, No. 439, of the *Burke Construction Company* v. *the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas,* brought suit in the Chancery Court of Miller County, Arkansas, March 19th, 1920, against the said Burke Construction Company and the United States Fidelity and Guaranty Company of Baltimore, Maryland, and M. C. Burke and J. A. Burke, sureties upon a bond, which the said Burke Construction Company had given to said Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas (R. 6).

The Answer to the Bill.

The defendant filed an answer to said bill of complaint August 30th, 1920, alleging that on the 29th day of November, 1916, the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Arkansas, the party of the first part, and the Burke Construction Company, as party of the second part, en-

tered into a contract whereby the said Burke Construction Company undertook to do certain grading, paving and curbing upon the streets in the City of Texarkana, Arkansas, at certain specified prices; that the said Construction Company did a part of the work during the first year within which it had agreed to complete the same, and the said Board of Improvement in order to induce the said Construction Company to finish the work extended the time one year until November 1st, 1918, and that the said Burke Construction Company at the end of that time not having completed said work was given another extension until November 1st, 1919, and that the said work still not being complete, the said Burke Construction Company quit the work in the month of December, 1919, whereby the Board of Improvement was damaged in the difference between the contract price of said work, and what it would take to complete the work according to the plans and specifications in the sum of $88,000.00. In the contract the defendant had the right to retain and had retained certain percentages of the amount due for work, amounting to $15,000.00, and the Burke Construction Company did some work in the month of November, 1919, amounting to approximately $4,500.00, which was held back as security for the performance of the contract. The defendant alleged that when said contract was made, the said Burke Construction Company furnished a surety bond to said defendant in the sum of $300,000.00, and the construction contract was made a part of said bond, and the same was conditioned that if the said Burke Construction Company

would well and truly perform said construction contract in all respects and comply with the terms and conditions thereof, then and in that event the said bond should be null and void, otherwise to remain in full force and virtue. Said bond was executed by the Burke Construction Company, the United States Fidelity and Guaranty Company of Baltimore, Maryland, M. C. Burke and J. A. Burke, of Fort Smith, Arkansas, and said bond was accepted and approved by said defendant, and upon the faith and credit thereof, the said contract was let to the said Burke Construction Company. Defendant further alleged that it is true that the Burke Construction Company filed a suit in the District Court of the United States for the Western District of Arkansas on the 16th day of February, 1920, in the sum of $85,000.00 for an alleged breach of the contract on the part of the defendant, and subsequently filed a substituted and amended complaint in which the damages claimed were $115,000.00; that the Burke Construction Company was and is the sole plaintiff, and this defendant Board was and is the sole defendant in said suit, and said suit purports to be only for damages for the alleged breach of contract.

The defendant further alleged that it had filed an answer in said cause to said damage claim, and had also set up a counterclaim against the said Burke Construction Company for damages on account of its breach of contract in failing and refusing to carry out said contract, amounting to $88,000.00; that it was shown in said answer and said counterclaim that the Burke Construction Company was insolvent, and that said company

had abandoned the work, and that the defendant had been damaged in the sum of $88,000.00.

It was further alleged by defendant that the sureties upon the bond of the said Burke Construction Company had not been made parties to said suit in the Federal Court, and would not be bound by any judgment, which should be rendered in said cause, to which they were not parties. The defendant was advised and believed that it had a right to bring suit upon said bond in the Chancery Court of Miller County, Arkansas, in which case the plaintiff, the said Board of Improvement, sued for an accounting and alleged that answers had been filed in said cause by the Burke Construction Company, the United States Fidelity and Guaranty Company of Baltimore, Maryland, M. C. Burke and J. A. Burke; that said suit in the Chancery Court was filed March 19th, 1920, after the suit of the Construction Company had been instituted in the Federal Court, but before said Board had filed an answer to the complaint in the Federal Court; that said suit in the Chancery Court was removed to the Federal Court by the defendant, the said Burke Construction Company, April 9th, 1920 (R. 127), in which motion the other defendants did not join, the said Burke Construction Company claiming that said suit insofar as it was concerned was a separable controversy; that the motion to transfer was sustained by the Chancery Court over the objection and against the protest of the defendant, the Board of Improvement; and after transcript was filed in the Federal Court, the said cause was remanded to the Chancery Court May 14th, 1920 (R. 129), on mo-

tion of said Board, where the said cause is now duly pending against the said Burke Construction Company and the sureties upon said bond for the purpose of recovering upon said bond the amount of damages due on said breach of said contract, and that the issues in said cause involve an accounting between the said Burke Construction Company and said Improvement Board, and the liability of the sureties upon said bond. These issues, parties and relief sought are different from those involved in the Federal Court in cause No. 439. The parties defendants in said cause include all the sureties upon said bond who are in no wise interested and concerned in said cause No. 439 pending in the Federal Court; that it is not true that the defendant brought said suit in the Chancery Court for the purpose of harassing or annoying the Burke Construction Company, or of obstructing the jurisdiction of the Federal Court in trying said cause, No. 439. On the contrary, the said Board of Improvement agreed to and sought to expedite the trial in the Federal Court, which was begun on the 20th day of July, 1920, the day fixed for the trial of said case in the Federal Court; but defendant did not waive its rights to insist upon the trial of said case at such a time as the parties could conveniently prepare for trial, and until such time as the Chancery Court could hear the same; and more than a month after the trial of said case in the Federal Court the said defendant Board on account of the public necessity and the public interests involved felt that they were bound and required to proceed with the case in the Chancery Court, since the ulti-

mate relief sought in the case was recovery upon said bond, which said sureties would not pay without suit; and had not been and could not be brought into the case No. 439 in the Federal Court on diversity of citizenship; and the defendant denied that the recovery in the Federal Court in case No. 439 in favor of either party would decide the case pending in the Chancery Court; and alleged that the sureties on said bond would not be bound by such decision.

After said chancery case No. 692 had been remanded by the Federal Court to the Chancery Court on May 14th, 1920, the Burke Construction Company, the United States Fidelity and Guaranty Company, M. C. Burke and J. A. Burke filed demurrers to the bill in chancery (R. 132), which were overruled (R. 130), on June 17th, 1920, and at that time the defendants in said cause agreed to file answers within two weeks, and the Burke Construction Company and J. A. Burke and M. C. Burke filed answers about July 1st, 1920, (R. 133), and the United States Fidelity and Guaranty Company filed answer about the first of August, 1920 (R. 146). The parties agreed to a trial of the cause in the Chancery Court for some convenient date in the summer of 1920, but no date having been agreed upon after trial in the Federal Court, the Board of Improvement gave notice that it would begin taking testimony in the chancery case in the State Court Tuesday, August 31st, 1920 (R. 15), and thereupon the bill of the Burke Construction Company against the Board was filed in the District Court of

the United States for the Western District of Arkansas, Texarkana Division, August 24th, 1920 (R. 4), praying that the said Board of Improvement be enjoined from further proceeding in said cause, which was heard by Honorable F. A. Youmans, Judge of said court, at Fort Smith, Arkansas, upon the pleadings and exhibits in said causes and the injunction was denied (R. 19), and an appeal was taken to the United States Circuit Court of Appeals by Burke Construction Company.

The cause, No. 692, Board of Improvement vs. Burke Construction Company, United States Fidelity and Guaranty Company, M. C. Burke and J. A. Burke involves different parties, issues and relief sought from the cause No. 439, pending on the law docket in the District Court of the United States for the Western District of Arkansas. Among the allegations in the complaint in equity filed by said Board in the Chancery Court of Miller County, Arkansas, it is alleged that:

> "There is a conflict between the theories of the plaintiff and the defendant, Burke Construction Company with reference to the kind and character of work and as to the materials to be used which the contract calls for, which involves the taking of much testimony and the statement of accounts upon the theory of each party upon practically every subject of said contract, including the character, quality and kind of curbing, guttering, the quantity and quality of gravel and the expense of preparing the same for use; the kind, quantity and quality of asphalt; asphalt macadam and brickwork; and in general there is a conflict between plaintiff and defendant upon many subjects arising under said contract

and there will be much accounting required with reference to the amount which plaintiff is entitled to recover in order to complete said contract abandoned by the defendant as aforesaid."

The issues in the state and federal court cases are different.

The answer of the United States Fidelity and Guaranty Company found on pages (R. 144, 146) presents defenses which are not involved in the case in the Federal Court in this, that said defendant surety company pleads that the Board of Improvement during the life of the contract and the two extension agreements was guilty of material deviations, departures and alterations in said contract without the defendant's knowledge or consent, and that said alterations increased the risk and hazard of the sureties on said bond. The breaches complained of were that the Board of Improvement and its Engineer compelled extra sweeping on large areas of the gravel base which had been laid in many places in the District; that the contractor was compelled to lay double the amount of asphalt called for in the contract, which caused the contractor to expend a greater amount of money over and above which it should not have done, and that the engineer required the Construction Company to lay four, five or six courses of gravel on all streets worked upon by said company while the contract provided for but two courses; that this greatly increased the cost of laying the gravel base; that after the contract was signed the said Board of Improvement made changes and

alterations in the specifications without the consent and knowledge of said surety company, wherein asphalt was substituted for brick surface, and many streets were paved with materials different from that specified in the contract, which increased the cost and expense of the Construction Company; that at the time of the execution of the contract sued upon, it was contemplated by all parties that the said Burke Construction Company use gravel in places where it existed on said streets in said District, and that the Board of Improvement required said gravel to be taken up by the Construction Company and the streets lowered.

ASSIGNMENT OF ERRORS.

The petitioner assigns the following errors in said cause:

1st. That the Honorable United States Circuit Court of Appeals for the Eighth Circuit erred in reversing the decree of the District Court of the United States for the Western District of Arkansas, Texarkana Division, in directing said court to issue said injunction restraining the said Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, from further proceeding in the prosecution of its cause No. 692, pending in the Chancery Court of Miller County, Arkansas, against the Burke Construction Company, the United States Fidelity and Guaranty Company, M. C. Burke and J. A. Burke.

2nd. The said United States Circuit Court of Appeals for the Eighth Circuit erred in holding that the District Court of the United States for the Western District of Arkansas, Texarkana Division, in which said Burke Construction Company filed law case No. 439 against the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, claiming damages for an alleged breach of paving contract, had exclusive jurisdiction to hear and decide the controversy between said parties involved in said suit, and the controversy between said parties involved in the equity suit No. 692, which was subsequently instituted in the

Chancery Court of Miller County, Arkansas, by said Board of Improvement against said Burke Construction Company, United States Fidelity and Guaranty Company, M. C. Burke and J. A. Burke, claiming the equitable relief for an accounting, and for damages for the non-performance of the contract as required by the bond sued upon.

3rd. The said United States Circuit Court of Appeals erred in holding that the state court did not have concurrent jurisdiction of said controversy so long as the Burke Construction Company insisted upon and demanded the right to try said cause No. 439 in the Federal Court, and the said United States Circuit Court of Appeals for the Eighth Circuit erred in directing the issuance of an injunction against the prosecution of said cause No. 692, based upon said concurrence.

4th. The said United States Circuit Court of Appeals erred in holding that the said Federal Court had the exclusive right to adjudicate the controversy involved in said suit between said parties, because the Burke Construction Company had brought its suit first and invoked the jurisdiction of the Federal Court.

5th. The said United States Circuit Court of Appeals for the Eighth Circuit erred in issuing an injunction against said Board of Improvement from further proceeding in said cause No. 692 pending in the Chancery Court of Miller County, Arkansas, against the sureties on the bond of the Burke Construction Company, or any of them, and erred in overruling the motion filed in said

court to modify said injunction in order that the said Board could proceed against the sureties on said bond (R. 162-165), who were not parties to cause No. 439 in the Federal Court.

6th. The said United States Circuit Court of Appeals for the Eighth Circuit erred in enjoining said Board from proceeding against either of said sureties for the reason assigned in the opinion of the court:

> "If the Burke Construction Company were properly called to defend, since it probably would be, probably would determine its liability to pay the amount of that judgment to the sureties, or the board, if the court below could adjudicate the controversy, that, conditioned the liabilities of the board, the Burke Construction Company and the sureties."

7th. The said Board of Improvement is aggrieved by the opinion of the Honorable United States Circuit Court of Appeals for the Eighth Circuit, and the decree ordering an injunction to be issued against the said board in pursuance of said opinion, in that said Board has been denied the equal protection of the laws to which said Board is entitled under Section 1, Article 14, of the Constitution of the United States, and that it has been denied the rights guaranteed to said Board by Section 2, Article 4, of the Constitution of the United States, which provides that:

> "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

The said opinion and decree is a denial of their constitutional rights in that the said Board of Improvement is prevented by said opinion and decree from proceeding with its suit upon the bond in the state court, whereas, the plaintiff, Burke Construction Company is given the right to proceed in the Federal Court in its suit, and resort to any state court as it may see fit in the prosecution of a suit covering the same controversy between the said Board.

8th. The Circuit Court of Appeals erred in rendering said opinion and decree because the same is in conflict with Section 265 of the Judicial Code of the United States which provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

ARGUMENT.

This case falls far within the unquestioned rule that the pendency in the state or other court of an action in personam which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it.

Case No. 439 in the United States District Court for the Western District of Arkansas, Texarkana Division, *Burke Construction Company* v. *The Board of Improvement of Paving Improvement District No. 20*, was an action *in personam* for the recovery on an alleged breach of contract. No property has been taken and no relief is sought except a plain judgment for money. The case No. 692 subsequently brought in the Chancery Court of Miller County, Arkansas, by Board of Improvement of said District against Burke Construction Company and the sureties on the bond for the performance of the work is also an action *in personam*, and no property has been seized, or involved, it is a suit in equity for an accounting and on the bond for money for breach of contract.

Whether the United States Circuit Court of Appeals for the Eighth Circuit should have issued the injunction upon the showing in the bill of the Burke Construction Company against the Board of Improvement of Paving Improvement District No. 20 and its answer thereto de-

pends upon an application of certain principles laid down by the United States Supreme Court in defining the boundaries of jurisdiction between the judicial tribunals of the states and of the United States, it being well recognized that in all such matters the federal courts have ultimate and final authority.

In the case of *Leonard Covell* v. *Sarah Heyman*, 111 U. S. 176-185, Mr. Justice Mathews, speaking for the court, says:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercised towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignity. To attempt to seize it by a foreign process is futile and void.
>
> "The principle which defines the boundaries of jurisdiction between the judicial tribunals of the states and of the United States, the application of which effectually prevents their confusion, was set forth and vindicated in the judgment of this court in

Ableman v. *Booth*, 21 How. 506. It was there said by Chief Justice Taney, page 516, 'That the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye.' "

In the case of *Mutual Life Insurance Company* v. *Harris*, 6 Otto, 588-593, 96 U. S., it was said:

"At law the pendency of a former action between the same parties for the same cause is pleadable in abatement to a second action, because the latter is regarded as vexatious. But the former action must be in a domestic court; that is, in a court of the state in which the second action has been brought.

"The rule in equity is analogous to the rule at law. In *Foster* v. *Vassal*, 3 Atk. 587, Lord Hardwicke said: 'The general rule of courts of equity with regard to pleas is the same as in courts of law, but exercised with the more liberal discretion.' In *Dillon* v. *Alvares*, 4 Ves., 357, a plea of a pending suit in a court of chancery in Ireland was overruled in the English court of chancery. Certain it is that the plea of a suit pending in equity in a foreign jurisdiction will not abate a suit at law in a domestic tribunal.

"If, then, a bill in equity pending in a foreign jurisdiction has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement; if, still more, it has no effect when pleaded to another bill in equity, as the authorities show, it is impossible to see how it can be a basis for an injunction against prosecuting a suit at law. It follows that the refusal of an injunction by the Circuit Court was not erroneous."

In case of *Stanton* v. *Embry*, 3 Otto, 548-558, 93 U. S., it was held that the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in a Circuit Court or in the Supreme Court of the District of Columbia, even though the two suits are for the same cause of action. And the court said:

> "It is insisted by the plaintiff that the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in the Circuit Court or in the court below even though the two suits are for the same cause of action; and the court here concurred in that proposition."
>
> "Repeated attempts to maintain the negative of that proposition have been made, and it must be admitted that such attempts have been successful in a few jurisdictions; but the great weight of authority is the other way."

In the case of *Gordon* v. *Gilfoil*, 9 Otto 168-179, 99 U. S., Mr. Justice Bradley said:

> "It has been frequently held that the pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a federal court. What effect the bringing of this suit may have had on the order of seizure and sale is not necessary to determine. It is possible that it superseded it. But the pendency of that proceeding, when the suit was commenced, cannot affect the validity of the proceeding in this suit, nor the jurisdiction of the court in respect thereof."

Many authorities are cited to sustain said proposition, and the following authorities of the United States Supreme Court sustain the same proposition:

Buck v. *Colbath*, 3 Wall. 334-347, 70 U. S.

Hunt v. *New York Cotton Exchange*, 205 U. S. 322-339.

St. L. I. M. & S. Ry. Co. v. *Wm. F. McKnight, J. Sam Rowland and Geo. W. Bellamy, Railroad Commissioners of the State of Arkansas et al.*, 244 U. S. 368, which affirmed the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of *Bellamy* v. *St. L. I. M. & S. Ry. Co.*, 240 Fed. 876, which reversed the case of *St. L. I. M. & S. Ry. Co.* v. *Bellamy*, 211 Fed., 173, which latter court had enjoined shippers and travelers from instituting suits against a carrier on account of overcharges collected from them when injunctions temporary and permanent, afterwards reversed by the Federal Court, were in force.

The opinion of the District Court in the case just cited, which was reversed, was much relied upon in the brief of the learned counsel for the Burke Construction Company in the Circuit Court of Appeals.

The opinion of the United States Circuit Court of Appeals, Eighth Circuit in the case at bar.

The majority opinion of the United States Circuit Court of Appeals of the Eighth Circuit in the case at bar has for its basis the uncontroverted facts that the Burke Construction Company had on February 16, 1921, sued the petitioner, The Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas, in the United States District Court for the Western District

of Arkansas, Texarkana Division, law case 439, for damages for alleged breach of a paving contract and subsequently, March 19, 1920, the said Board of Improvement instituted an equity suit in the Chancery Court of Miller County, Arkansas, upon the bond given by Burke Construction Company and its sureties, The United States Fidelity and Guaranty Company, M. C. Burke and J. A. Burke for the performance of said contract; the relief sought being an accounting and for damages for breach of the conditions of the bond, no property being seized or involved in either court; and Circuit Judge Sanborn, upon these facts, held:

> "The conclusion is that the power was vested in and the duty was imposed upon the court below to prevent by its injunction, until it could adjudge the controversy between the Burke Company and the Board and its members, and could enforce its final judgment or decree in the suit in that court, the prosecution by the Board, its members, attorneys, agents or representatives of its suit in the state court against the defendants therein or any of them which would or might interfere with, delay, or impair the effect of its adjudication between the Burke Company and the Board involved in the first action which was brought by the Burke Company in that court."
>
> "The constitutional right of the Burke Company to the exclusive adjudication of this controversy and to the enforcement of that adjudication by the Federal Court may not be lawfully evaded or avoided by the Board, or by its members, or agents, either by joining the sureties of the Burke Company as defendants with the latter in a suit by the Board against them, or by suing them separately in a state court to obtain in that court an adjudication of the

controversy between the Burke Construction Company and the Board which conditions the liability of each to the other and the injunction to be issued pursuant to this decision should be broad enough to prevent any such result."

The foregoing opinion and conclusions in the case at bar of the eminent circuit judge, we respectfully submit, add qualifications to the previous decisions of the United States Circuit Court of Appeals of the Eighth Circuit, which are not sustained by the decisions of the Supreme Court, and are not necessary to the constitutional rights of suitors in the Federal Courts, and draw a marked distinction between the plaintiff and defendant and it is respectfully urged that said conclusions are erroneous.

That the said Board of Improvement had the right to institute and prosecute the said equity suit filed in the Chancery Court of Miller County, Arkansas, on account of alleged breach of conditions of the bond is ably sustained by the dissenting opinion rendered by Judge Robert E. Lewis, United States District Judge of Colorado, who was a member of the court deciding this cause.

Dissenting Opinion of Judge Robert E. Lewis.

"Taking the two proceedings as both *in personam*, I admit at once that the jurisdiction of the Fereral Court in the law action cannot be ousted or obstructed by the suit in equity brought later in the State Court; and I think an admission to the converse is equally necessary, that the jurisdiction of the State Court, cannot be ousted or obstructed by the prior action in the Federal Court. Each party had a right to invoke, by appropriate pro-

cedure, the jurisdiction of the tribunal to which he appealed, and I do not conceive that the right of one is any greater in that respect than that of the other. Each is a suitor before a court with plenary power to decide the one controversy, and there is no presumption that one will decide it better, or more justly, than the other. Jurisdiction is the right and power to hear, consider and determine a controversy between parties litigant. How, then, does the exercise of that power by the State Court interfere with or impede the exercise of the same power by the Federal Court? The same right, duty and power is lodged in each, it is concurrent, and when exercised by one the controversy is at an end. There would then be no longer a cause in which the power could be exerted, and there could be no conflict or interference. The controversy would become *res adjudicata*, and the parties plaintiff had an equal right to proceed until that end was reached. I understand this to be the rule of comity which came out of the necessities of our dual system, and which, it is said, ripened long ago into a principle of right and law. I had believed that this court had firmly announced its adherence to the rule in *Merritt* v. *Steel Barge Co.*, 79 Fed. 228" (R. 179).

Federal Courts have no jurisdiction to restrain proceedings pending in a state court even though it is between the same parties and involving the same issues, unless (and this is the sole exception) in one or the other of the courts property is in custodia legis such as in a receivership or bankruptcy proceeding.

Section 265 of the Judicial Code provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The proceeding in the chancery court did not interfere with the jurisdiction of the federal court to try said cause and it is submitted that the foregoing statute covers the case at bar expressly denying to the federal court the right to stay proceedings in the state court.

The basis for issuing the injunction fixed by the United States Circuit Court of Appeals is that the plaintiff invoked the constitutional right to proceed in the federal court with said case, and in the opinion, a reference is made to the fact that the suit in the federal court was brought in advance of the Board filing suit in the chancery court of the state. If the opinion is sound, it makes no difference whether the suit in the state court was filed first or last.

The basis of the opinion is not reenforced by the fact that the suit in the federal court was filed first for the suit in the state court would interfere no less whether it was filed before or after the case in the federal court was filed.

The opinion and decree of the Circuit Court of Appeals gives an advantage to the Burke Construction Company, in that the said company is at liberty to proceed with its law case in the Federal Court and to institute without restraint suits in the state courts upon the same subject matter, while the defendant is denied the right to proceed with its suit upon the bond in the state court.

In this situation the Board of Improvement respectfully submits that it has been denied the rights guaranteed by the Constitution of the United States, as set out in Section 1 of the 14th Amendment to said Constitu-

tion, guaranteeing to every person within the jurisdiction of any state the equal protection of the laws, and Section 2 of Article 4 of the Constitution providing that:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

In the opinion of the Circuit Court of Appeals it is conceded that the Burke Construction Company, after filing suit in the Federal Court, had the right to proceed in the same controversy by filing another suit in a state court, but the court holds that the defendant, said Board of Improvement, cannot proceed in the state court upon its cause of action arising out of the same contract which the Burke Construction Company sued upon, on the ground that the Burke Construction Company has invoked its constitutional rights to sue in the Federal Court.

While thus going far to protect the Burke Construction Company by enjoining the said Board of Improvement from proceeding with its cause pending in the Chancery Court of Miller County, Arkansas, we insist that the constitutional rights of the said Board have been invaded by making a distinction between the suitors in the Federal Court, giving the plaintiff an advantage which was not warranted by the Constitution of the United States, and said distinction was not seen by said court in the decision which had shortly before been rendered by said court in the case of *W. E. Stewart Land Company* v. *Arthur*, 267 Fed. 184. The Circuit Court

of Appeals for the Eighth Circuit has also previously decided the case of *Merritt* v. *American Steel Barge Company*, 79 Fed. 234, in which it was thought that the rights of the plaintiff and the defendant were equal with reference to going into another jurisdiction for the institution of a suit in the state court upon the same subject involved in the Federal Court. The court in that case said:

> "In the case of *Sharon* v. *Terry*, 36 Fed. 337, 359, 360, it was conceded by Mr. Justice Field that a plaintiff has a right to sue on the same cause of action in different jurisdictions, where nothing more than a personal judgment against the defendant is demanded; *and if such be the law, we can see no sufficient reason for denying the right of a defendant who has been sued in one jurisdiction* for the recovery of a personal judgment against him, to bring an action against the plaintiff in another jurisdiction, although that action is of such nature that it may require a determination of the same issue which is involved in the first suit * * *."

Holmes County, Mississippi, versus Burton Construction Company, 272 Federal Reporter, 566, from Fifth Circuit.

III.

The Holmes County case here cited is like the case at bar, but the United States Circuit Court of Appeals of the Fifth Circuit reached conclusions directly opposite to the opinion of the Eighth Circuit in the case at bar. Holmes County, Miss., entered into a contract with Burton Construction Company and W. F. Allen to build cer-

tain public roads and the contractor gave a bond for its faithful performance and, after the contract had been partly performed, the Construction Company and Allen on December 24, 1917, brought suit in the Federal Court against the county for damages for alleged breach of contract.

Holmes County then brought suit on the bond given by Burton Construction Company and Allen as principals and the National Surety Company as surety in the Chancery Court of Holmes County, Miss., to recover on said bond because of alleged failure of said Construction Company and said Allen to perform said contract, to the damage of the county, in a large amount which was alleged to constitute a breach of said bond. Subsequently the suit was dismissed by the county as to the construction company and thereafter proceeded against the National Surety Company as sole defendant.

The Burton Construction Company on April 27, 1920, filed a bill in the United States District Court for the Southern District of Miss., enjoining Holmes County from prosecuting said suit on said bond on the ground that it involved the same controversy and subject matter as was involved in the suit previously brought by said Construction Company and Allen against said county in said United States District Court. The county answered insisting that the bill set forth no case entitling the complainant to the relief sought; also because the case sought to be enjoined is not between the same parties as that pending in the United States Circuit Court. On hearing the court granted a preliminary injunction with leave to

the defendant Holmes County to take steps to make said Surety Company a party defendant to the consolidated actions at law brought by the Burton Construction Company and Allen in said United States District Court.

Holmes County prosecuted an appeal assigning error in the granting of said preliminary injunction. The United States Circuit Court of Appeals of the Fifth Circuit in reversing the action of the lower court, among other things, said: "We think that the court should have denied said injunction and sustained the motion to dismiss said bill for want of equity. Even if the suit in the state and federal courts had been between the same parties, being purely an action *in personam*, involving neither in its progress nor in the judgment sought, the control or disposition of any property, the pendency of the suit in the United States Court would not, in the absence of special circumstances, furnish ground for an injunction of the state court suit. It has been held that a prior suit in a state or federal court in the same state furnishes no ground for a plea in abatement to a second suit in the court of the other jurisdiction. *Stanton* v. *Embry*, 93 U. S. 548, 23 L. Ed. 983; *Gordon* v. *Gilfoil*, 99 U. S. 168, 25 L. Ed. 383; *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322, 339, 27 Sup. Ct. 529, 51 L. Ed. 821.

"We do not think that this is the same cause of action as that pending in the said United States District Court. The suit in the United States District Court is one by Burton Construction Company and Allen to recover damages against the county. The case in the state

court is one on the bond of the surety company to recover for alleged damages suffered by Holmes County for an abandonment of the contract, to guarantee the performance of which this bond was given. While the conduct of the contractors and the county in respect to the contract to build the roads is involved, it is not the only question involved. There might be other and different issues between the surety company and the county. It certainly is not between the same parties.

"No judgment against the surety company could be had in the consolidated suits at law pending in the United States District Court. That company could not be made a party thereto, by the defendant, Holmes County, and a suit on its bond injected into this suit for damages between Burton Construction Company and Allen as plaintiffs and Holmes County as defendant. Of the present case it may be truly said: This case falls far within the unquestioned rule that the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it." Citing many authorities.

The opinion of the Circuit Court of Appeals for the Eighth Circuit in the case at bar is in conflict a uniform line of previous decisions of said court.

The Circuit Court of Appeals for the Eighth Circuit as early as January 29th, 1894, committed itself to

the doctrine that the state and Federal Courts have concurrent jurisdiction where the action is merely for the recovery of money, and that proceedings in the state court is not an interference with the jurisdiction of the Federal Court in the case involving the same subject. In the case of *Standley* v. *Roberts*, 59 Fed. 836, heard before Caldwell, Sanborn and Thayer, circuit judges in the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said:

> "There is no doubt that, in suits in which the court obtains jurisdiction by the seizure or control of the subject matter of the suit, the court which first acquires jurisdiction over it may retain the property in its custody until final judgment, and in many cases until such judgment is satisfied, and that it may use its writ of injunction, or other proper process to this effect. It is equally well settled that the pending of an action in one court will not bar or abate another action between the same parties involving the same issues in a court of coordinate jurisdiction, in which that jurisdiction is exercised, not by seizure of the property, but by personal service of the original process upon the defendants."
>
> *Stanton* v. *Embrey*, 93 U. S. 548, 554, and causes cited.

In the case of *Merritt* v. *American Steel Barge Co.*, decided by the Circuit Court of Appeals for the Eighth Circuit, Caldwell and Thayer, judges, sitting, 79 Fed. 228, Judge Thayer, speaking for the court, said:

> "It does not follow, however, that the rule of comity to which we have referred operates to prevent a court from taking jurisdiction of a cause in all cases where a prior suit involving the same issue or issues has been commenced in some other forum,

and jurisdiction has been acquired by such other court over the parties litigant. Whether the pendency of a prior suit has such effect depends, as Mr. Justice Miller remarked, in substance, in *Buck* v. *Colbath*, 3 Wall. 334, 335, upon the character of the prior suit, the nature of the remedy and the relief sought, and the identity of the parties. If the prior action does not deal either actually or potentially with specific property or objects, but is strictly a suit *in personam*, in which nothing more than a personal judgment is sought, no reason is perceived why a subsequent action may not be brought and maintained in another jurisdiction, although it involves the determination of the same issue or issues on which the right to recover in the first suit depends. The bringing of such second suit, under the circumstances supposed, does not oust the court in which the first suit was instituted of its jurisdiction, or delay or obstruct it in the exercise of its jurisdiction, or lead to a conflict of authority, where each court acts in accordance with well established rules of law. Although a judgment may be rendered in the second suit before the first suit is tried, and may be pleaded in bar in the latter suit because the issue and the parties to the two suits are the same, yet it has never been supposed that the fact that a judgment of another court is offered in evidence to conclude the parties on a given issue or issues either defeats or impairs its jurisdiction, or has any necessary tendency to occasion a conflict of authority. Whatever doubt we might otherwise entertain concerning the question whether the pendency of a suit strictly *in personam* has the effect of preventing a party to that suit from subsequently bringing a suit in another jurisdiction involving the same issue, and from pleading the judgment there recovered as an estoppel in the former action, is resolved by the fact that in a number of cases such practice has been sanctioned by the highest authority."

The court then cited the following decisions of the Supreme Court of The United States in support of the opinion:

Stanton v. *Embrey*, 93 U. S. 548.
Insurance Co. v. *Harris*, 97 U. S. 331.
Buck v. *Colbath*, 3 Wall. 334.
Standley v. *Roberts*, 19 U. S. App. 407, 59 Fed. 836.

Judge Thayer, in distinguishing the opinion announced in said case, from that of *Sharon* v. *Terry*, 36 Fed. 337, which is relied upon in the Burke Construction Company's opinion, said:

> "And in the case of *Sharon* v. *Terry*, 36 Fed. 337, where a suit had been brought in the Federal Court to *compel the surrender and cancellation of a paper* purporting to be a written declaration of marriage, and to restrain the use thereof on the ground that it was a forgery, and a suit for divorce had subsequently been brought in a state court, wherein the writing was found to be genuine, Mr. Justice Field declined to recognize the latter adjudication; holding that, as the Federal Court had first acquired jurisdiction of the controversy to compel the surrender and cancellation of the forged document, it was not bound to adopt the finding of the state court that the document was genuine."

In the case of *Ogden City* v. *Weaver*, decided by the Circuit Court of Appeals for the Eighth Circuit, April 20, 1901, 108 Fed. 564, Judges Caldwell, Sanborn and Thayer sitting it was said:

> "It is urged, however, in behalf of the defendant city that if the decree which it had secured in the state court is interlocutory and not final, and

for that reason cannot be invoked in support of its plea of *res judicata*, nevertheless the mere pendency of the case in the state court should have induced the trial court to suspend all proceedings in the case at bar until the action in the state court was finally heard and determined. This contention, however, is based upon a misconception of the character of the present proceeding, which is an action at law, *in personam*, to recover a sum of money due under a contract. It is not a case which affects the custody of any property over which the state court has first acquired jurisdiction. Neither is it a case which involves any interference with the orderly conduct of the litigation in the state court. It is simply one of those cases such as frequently occur, where a state court and a federal court, in the exercise of a jurisdiction which rightfully belongs to each, are called upon to determine the same question, and the fact that they may disagree and decide the question differently in no wise interferes with the right of either to proceed. It is well settled that the fact that a suit upon a cause of action is pending in a state court will not sustain a plea of *lis pendens* to a suit upon the same cause of action subsequently filed in a federal court. *Stanton* v. *Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Insurance Co.* v. *Harris*, 97 U. S. 331, 24 L. Ed. 959; *Buck* v. *Colbath*, 3 Wall. 334, 345, 19 L. Ed. 257; *Standley* v. *Roberts*, 19 U. S. App. 407, 421, 8 C. C. A. 305, 59 Fed. 836. The rule is quite different, of course, when, after a suit is brought in a state court which affects the custody of property, or at some stage of the proceeding may affect its custody a suit of a like nature is subsequently brought in a Federal Court. In such cases the rule is well established that the court which first acquires jurisdiction of the *res*, actual or constructive, is entitled to proceed without let or hindrance on the part of any other court of coordinate jurisdiction" (*Merritt* v. *Barge Co.*, 49

U. S. App. 85, 24 C. C. A. 530, 79 Fed. 228; *Zimmerman* v. *So Relle*, 49 U. S. App. 387, 25 C. C. A. 518, 80 Fed. 417; *Gates* v. *Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961).

In the case of *W. E. Stewart Land Company* v. *Arthur*, 267 Fed. 184, decided August 23rd, 1920, in the United States Circuit Court of Appeals for the Eighth Circuit, Judges Hook, Stone and Lewis sitting, it was said:

> "In the Iowa case there was no custody of property which might lawfully be protected by the injunctive process. It was purely *in personam*. The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course (See *Barber Asphalt Co.* v. *Morris*, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761). The prohibition of injunctions by courts of the United States staying proceedings in state courts extends to all steps in the process of a cause. This obviously includes the taking of depositions. Otherwise a case might be effectively halted at the start or brought to failure."

In the case of *Barber Asphalt Co.* v. *Morris*, 132 Fed. 945, the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said:

> "The general rule upon this subject has been so clearly announced and so often affirmed by the Supreme Court and by this court, that it is no longer open to debate or consideration. It is, that the pendency in a state court of an action brought by plaintiff in a subsequent action between the same

parties in the Federal Court, and which involves the same subject matter, presents no bar and furnishes no ground for the abatement of the latter action."

See also cases for the Eighth Circuit:

Gates v. *Bucki*, 53 Fed. 961.
Zimmerman v. *LoRelle*, 80 Fed. 417.

In *Green* v. *Underwood*, 86 Federal 429 the court made use of the following language:

> "No rule of practice is better settled than that in an action at law *in personam*, pending in the United States court, the plea of *lis pendens* between the same parties in a suit brought in the state court is no bar to the prosecution of the action in the United States Court."

To the same effect is *Bunker Hill & Sullivan Mining and Concentrating Co.* v. *Shoshine Mining Co.*, 109 Federal, 504, 508 wherein the court expresses itself as follows:

> "Although in former years there was considerable controversy, and much conflict of opinion, upon this point, it must now be considered as settled that the pendency of a prior suit in a state court cannot be pleaded in bar to a suit in a federal court even between the same parties and involving the same issues."

See also *City of Mankato* v. *Barber Asphalt Paving Co.*, 142 Fed. 340.

Decisions of other Circuit Courts of Appeals and District Courts.

In the case of *Baltimore and Ohio Ry. Co.* v. *Wabash Ry. Co.*, 119 Fed. 678, decided November 11.

1902, by the Circuit Court of Appeals for the Seventh Circuit, Circuit Judge Jenkins rendering the opinion, it is said:

> "Where a suit is strictly *in personam*, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law" (*Stanton* v. *Embrey*, 93 U. S. 548, 23 L. Ed. 983; 8 Rose Notes, 1010). The doctrine is lucidly stated by Judge Thayer in *Merritt* v. *Steel Barge Co., supra.*"

In the case of *Woren* v. *Witherbee, Sherman and Company*, 240 Fed. 1013, Judge Ray of the District Court of N. D. New York after a very thorough review of the federal authorities, said:

> "In each case the defendant asserts that it should not be harassed by the pendency of a case in the state court and also the pendency of a case on the same cause of action in the United States Court, and that the plaintiff, he having first sued in the state court should either discontinue in the state court or be enjoined by the U. S. District Court from prosecuting the case in such District Court until a trial, determination and judgment in the state court. But both courts have jurisdiction of this cause. If the federal court enjoins the plaintiff in its own court from proceeding further, it is refusing to exercise its own power and jurisdiction and in effect surrendering it to the state court. This the

federal court cannot do, unless there is property or property rights involved which is the subject matter of the litigation and custody of which is in the state court. As I understand the rule when there is *res*, and the one court having jurisdiction has taken possession (in effect) of that *res* and is proceeding to hear the case and adjudicate regarding it the other court of concurrent jurisdiction will not exercise its jurisdiction regarding or over that subject matter as to the same question."

We submit the following additional authorities to sustain the proposition that an action in a state court *in personam* which involves no claim to or lien upon specific property in the possession of, or under the dominion of a national court will not be enjoined by a federal court which also has concurrent jurisdiction of a suit involving the same matter:

McCellan v. *Carland*, 217 U. S. 268.
Defiance Water Co. v. *City of Defiance*, 100 Fed. 178.
In re Lasserot, 240 Fed. 325.
Harton v. *Howley*, 155 Fed. 492.

In Corpus Juris, Volume 1, beginning at page 15, the title "Abatement and Revival," appears, and the sub-title, "Another Action Pending" appears at page 45. Under that sub-title the following principles are stated:

"Section 110. The rule that a subsequent action may be abated by the pendency of a prior one between the same parties for the same cause is confined, both at law and in equity, to those cases in which the former action is pending in a court of the same state or government, and does not apply where

such former action was commenced and is pending before the court of a foreign or different jurisdiction."

"Section 122. It is now well settled as a general rule that the pendency of a prior suit in a state court is not a ground for abatement of a subsequent suit in the federal court, although the prior suit is between the same parties and for the same cause; nor is the pendency of a suit in the federal court ground for abatement of a like suit in the state court. And this rule applies according to the weight of authority, even though the courts are in the same state and the state court is within the district covered by the jurisdiction of the federal court."

"Section 127. Of course, aside from any question as to the difference of jurisdictions, and under the general rules applicable in other cases, pendency of an action in the federal court is not ground for abatement of a subsequent action in a state court, or vice versa, where there is not the necessary identity of causes of action, issues and parties, or where the relief sought and obtainable is not the same."

In 15 Corpus Juris, at pages 1163 to 1165, under the heading "courts", are laid down the limitations to the rule that the court first acquiring jurisdiction of a cause retains the same to the exclusion of other courts. Exclusive jurisdiction applies only where the parties to, the subject matter of, and the relief sought in the second suit are the same, so that if the first suit had already been disposed of the judgment therein should be treated in bar as a former adjudication. In support of this a great number of decisions from the United States Courts are cited under note 67. The further exception is also

made that exclusive jurisdiction does not attach where one suit is at equity and the other at law. And the rule is limited to actions which deal either actually or potentially with specific property or objects and where a suit is strictly *in personam*, nothing more than a personal judgment being sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined.

III.

Pendency of an action in the Federal Court is not ground for abatement of a subsequent action in a state court, or vice versa, where there is not the necessary identity of causes of action, issues and parties, or where the relief sought and obtainable is not the same.

The Board of Improvement of Paving Improvement District No. 20, Texarkana, Arkansas, shows to the court that cause No. 439 of the Burke Construction Company against the Board, pending in the District Court of the United States for the Western District of Arkansas, is a suit for damages arising out of the alleged breach of contract against said Board, which said Board is contesting, and that said Board has filed its counterclaim in said cause against the Burke Construction Company for breach of contract in failing to complete said pavement by said Burke Construction Company.

The bill pending in the Chancery Court of Miller County, Arkansas, involves other parties, to-wit: United

States Fidelity and Guaranty Company, M. C. Burke and J. A. Burke, who are jointly and severally liable to the Board of Improvement upon said bond given by the Burke Construction Company for the completion of said contract, and said case involves an accounting which should result on a trial in a judgment against the bond, jointly and severally, for the difference between the contract price of said work and the amount required to complete said work at the time the said contract was broken by the Burke Construction Company, March 16, 1920. The questions arising upon said accounting are various and complex, and a trial of said cause before a jury is impracticable.

The parties and the issues in said cases are different, especially insofar as the sureties are concerned, who are themselves as much liable for the performance of said contract as the Burke Construction Company itself; said bond in express terms makes the contract for paving a part of the obligation of the bond.

It is seen that whatever judgment may be rendered in case No. 439, in the Federal Court, that no decision can be rendered which would be final or binding upon the sureties upon said bond. No execution could be issued against the sureties upon said bond on any judgment which may be rendered in the Federal Court in a case to which they are not parties, and said sureties have presented a different defense in the Chancery Court from that of the Burke Construction Company, and are claiming that they have been released from liability by certain actions of the Board in agreeing to alterations of the

contract, and for other reasons set out in said answers. It is alleged in the bill of complaint in the Chancery Court, as well as in the counterclaim filed by the Board in the Federal Court, that the Burke Construction Company is insolvent, and that a judgment against said company in favor of the Board would be uncollectible should the injunction herein prayed for be granted and perpetuated, the Board of Improvement would be deprived of collecting the bond, or at least postponed until the end of the litigation in cause No. 439, which may be extended through a period of years.

Upon the question as to the identity of causes, parties and issues, which would prevent a second suit from being prosecuted in the same jurisdiction, we quote from *Buck* v. *Colbath*, 3 Wall. 334-337:

> "In examining into the exclusive character of the jurisdiction of such cases, we must have regard for the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Hence, in all the suits, the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the decree of neither court is affected by the proceedings in the other. And this is true notwithstanding the common object of all the suits may be the collection of the debt."

The case of *Holmes County* v. *Burton Construction Company*, 172 Fed. 554, is identical with the case at bar, and held that a suit against sureties in the State Chancery Court could not be enjoined by the Federal Court in which the Construction Company had instituted the law case against the obligees of the bond.

In the case of *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 339, the court said:

> "In *Watson* v. *Jones*, 13 Wall. 679, we consider that identity of parties, rights and relief prayed for are necessary to enable the pendency of an action in one court to be pleaded in bar at another court, and it was said: 'The identity in these particulars should be such that if the parties case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.' The principle was also expressed in that case and sustained by authorities that the possession of property by one court could not be interfered with by another. The case at bar has not that feature, nor has it the identity with the chancery case of Shelby County. Its parties and purposes are different. The pendency of a suit in a state court does not deprive the Federal Court of jurisdiction."

IV.

Whatever judgment may be rendered in said cause No. 439 will not be res judicata as between the Board of Improvement and the sureties on the contractor's bond.

It is the contention of the Board that the sureties of the bond will not pay any judgment which may be recovered against the Burke Construction Company in the

Federal Court, and that said sureties cannot be bound to pay the same, and that whatever judgment may be rendered in said cause No. 439 will not be *res judicata* as between the Board of Improvement and the said sureties on the bond.

The contract and bond sued upon by the Board of Improvement in the equity case are obligations entered into and existing under the laws of the State of Arkansas. Sec. 5719 of Kirby's Digest, under the heading "Municipal Corporations" and sub-heading, "Improvement Districts," provides:

> "All contractors shall be required to give bond for the faithful performance of such contracts as may be awarded them with good and sufficient sureties in double the amount of the contract work, and the Board shall not remit or excuse the penalty or forfeiture of said bond or the breaches thereof. They may appoint all necessary agents for carrying on the work, and may fix their pay. They may buy all necessary material and implements, and may sell any such material or implements as may be on hand, and which may not be necessary for the completion of the improvement under way, or which may have been completed; and may, in general, make all contracts in the prosecution of the work as may best subserve the public interest."

By virtue of the Statutes of Arkansas, the bond sued on in the equity case is a general and several obligation. Section 4420 of Kirby's Digest of the Statutes of Arkansas, provides:

> "Joint obligations shall be construed to have the same effect as joint and several obligations, and may be sued on, and recoveries had thereon in like manner."

Under the heading "Pleading and Practice," Kirby's Digest, Sections 6009 and 6010 provide:

"Section 6009. Persons severally liable upon the same contract, including parties to bills of exchange, promissory notes, common orders and checks, and sureties on the same or separate instruments, may all, or any of them, or the representatives of such as may have died, be included in the same action, at the plaintiff's option."

"Section 6010. Where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option. Where any of the persons so bound are dead, the action may be brought against any or all of the survivors, with the representatives of all or any of the decedents, or against the latter or any of them. Where all the persons so bound are dead, the action may be brought against the representatives of all, or of any of them. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the other."

Sections 6229, 6230 and 6232, provide:

"Section 6229. Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants."

"Section 6230. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper."

"Section 6232. Though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants if the action had been against them alone."

The Board of Improvement, upon the contract and bond given to it by the Burke Construction Company, is entitled to maintain a joint suit against all of the obligors, or a separate suit against any one or more. The settled rule in Arkansas is that a judgment against or in favor of one obligor is not available against or in favor of another obligor sued in a separate action.

We cite the case of *State Bank* v. *Robinson*, 13 Ark. 214, in that case a bond was executed by John Brown as principal, and the defendants as sureties. One of the defendants, Waddell by name, pleaded in bar of the action that the State Bank had sued the principal Brown for the breach of the same identical obligation, in which suit Brown had interposed pleas of payment and accord and satisfaction, and judgment had been rendered in Brown's favor. This court will notice that the effect of the defendant's plea was that the principal having been acquitted of liability upon the bond, this necessarily released the sureties from liability. The Supreme Court of Arkansas said:

> "It would seem that under the application of these general rules, without going any further into the doctrine of estoppel, and the case before the court does not require it, the bar attempted to be set up by the plea of the defendants is not available to them. And it is to be observed that under the construction given to our statute making all obligations joint and several, and authorizing a party having a cause of action against several persons and entitled by law to but one satisfaction, to sue all jointly, or as many of them as he may think proper, it is in the power of the plaintiff, by bringing separate

suits to deprive each defendant of the bar arising from a recovery by another defendant. * * *"

"While the true reason and policy of the statute are to enable the plaintiff to recover against such of the defendants as are liable to him, without regard to the joint character of the undertaking, its effect must also be that the same matter is examinable in each separate suit. * * * Probably the fair construction of the statute would be that the bar of the former recovery is available to the party who was discharged upon a trial of the merits of the same matter in a former suit, without regard to whether either action was in form joint or several. But in no event would the estoppel be available to the party pleading it unless he was a party to the former suit."

The court then proceeds to say:

"The plea, however, in this case was evidently interposed upon the supposition that the principal debtor having been discharged by a general verdict and judgment upon pleas of payment and accord and satisfaction, and his liability being thereby extinguished, it followed as a necessary consequence that the liability of the sureties was also extinguished. And it remains to inquire whether there is anything in the nature of the contract here sued upon which would give that effect to a judgment in favor of the principal debtor. The idea seems plausible enough, but we cannot find that it has any foundation in law. Though the relation of principal and surety may exist between the co-obligors, yet so far as the obligee is concerned, they are all principals; in other words, it is an original undertaking on the part of all, and they are all equally bound to performance. They are not mere guarantors that the principal will pay; their liability is not merely consequential upon his failure to do so, but they are primarily liable for the debt. Such is the legal effect of the contract,

and so far as the modifications of it in equity are to be regarded as exceptions, they go to establish the general rule."

On the question of privity between the principal and the surety the court said:

"Nor is there any such privity between the co-obligors, or between principal and surety as would sustain the plea here interposed. An incident to the doctrine of estoppel is that the estoppel binds not only the parties, but their privies, that is, those who succeed and represent them, and the privy is supposed to stand in the place of the party, and for all the purposes of the estoppel is regarded as the party himself. The administrator, the heir, the assignee, are in privity with the intestate, the ancestor, the assignor, and therefor take the benefit as it was charged with any burden in the hands of him whom they represent. There may be a joint interest or a community of interest in the subject matter of a contract between the parties, but it is not that privity or succession to which the estoppel applies. The strongest illustration of union and identity of interest is that subsisting between co-partners. Their contracts are not only necessarily joint, but there is a mutual agency, as to all matters within the scope of the partnership. But the case of *Barkman* v *Hopkins*, 11 Ark. 160, is decisive of the question whether a copartner is estopped by a judgment against the firm, in a suit to which he was not a party. There the point was whether, under the facts alleged, Barkman had notice so as to make him a party, but it was not argued or supposed that he was estopped by the judgment unless he was a party."

The court further says, at page 221:

"But if it be argued that, in the case before the court, the obligation of the surety was only an un-

dertaking for the principal that he would pay the money, and that the surety is discharged by an adjudication that he does not owe it, in order for that to be so, it necessarily follows that the surety would be estopped from denying that he is liable by the same judgment, if it had been against the principal and in a suit to which he (the surety) was not a party, of which he had no notice, into which he could not obtrude himself for the purposes of contesting, and from which he had no right to appeal—a startling proposition so far as the right of sureties is concerned."

The court concludes its opinion, at page 224, by making the following statement:

> "The cases cited on this point for the defendants in error, go to establish the general doctrine that a judgment is an estoppel to the parties to it and their privies, but it is nowhere intimated that there is such privity between the co-obligors as makes a judgment for or against one an estoppel against the creditor of another of the obligors not a party to the former suit."

This case, as far as counsel for petitioner have been able to learn, has not been distinguished, differentiated, nor overruled, and the principles announced are the well settled law of the State of Arkansas. The bringing of a joint suit against all or a separate suit against one or more co-obligors is familiar practice to our lawyers and courts.

V.

Suit in state court was not for the purpose of interfering with the jurisdiction of the Federal Court, and is not a legal interference with the rights of the Burke Construction Company.

The allegations of the bill for an injunction against the Board that the said bill was filed in the Chancery Court for the sole purpose of depriving the United States District Court of jurisdiction in case No. 439, are sustained by no facts. The question is simply whether or not the two courts have concurrent jurisdiction, and, if so, the Board of Improvement had the right to file the bill in the Chancery Court upon the bond for the collection of the liability thereon, and it was not a legal fraud upon the jurisdiction of the Federal Court to do so. The allegation of fraud in general terms presents nothing to the court, as shown in an opinion by Mr. Justice Lurton, speaking for the Supreme Court of the United States in case of *Rock Island and Pacific Ry. Co. et al., Plaintiffs in Error*, v. *Dowell*, 229 U. S. 102-114.

And the opinion of the same court by Mr. Justice Holmes in *Chicago, R. I. & P. R. Co.* v. *Schwyhart*, 227 U. S. 184-194, in which it is said:

> "If there is a joint liability, he (the plaintiff) has absolute right to enforce it, whatever the reason that makes him wish to assert that right."

In this connection with reference to the conduct of the Board of Improvement in its suit pending in the Chancery Court of Miller County, Arkansas, it should

be recalled that Chancery suit No. 692 was instituted on the 19th day of March, 1920, returnable in 20 days, and that the issues were not made up in said cause until the answers of the Burke Construction Company, M. C. Burke and J. A. Burke were filed July 1st, 1920, and the answer of the United States Fidelity and Guaranty Company was filed August 1st, 1920. The suit of the Burke Construction Company was filed in the Federal Court February 16th, 1920, and the issues were made up in that case when the answer was filed July 2nd, 1920, and the cause was set for trial July 20th, 1920; and the trial consumed about 10 days, resulting in a mistrial, and the cause was then continued until the next term of the court, which began first Monday in November, 1920. After the trial in the Federal Court the Board of Improvement had set for trial for August 31, 1920, the cause in the Chancery Court which it had instituted against the said Burke Construction Company and the sureties on the bond to recover damages for breach of contract on account of the Burke Construction Company quitting the work before it was completed. There is nothing in this procedure as the Board contends showing disrespect for the Federal Court, or that the said Board was proceeding in a disorderly manner.

Wherefore, petitioner, John P. Kline, Milton Winham, and Paul G. Huckins, as the Board of Improvement of Paving Improvement District No. 20 of Texarkana, Arkansas, respectfully prays that the decree of the Honorable Circuit Court of Appeals for the Eighth

Circuit and every part thereof be reversed by this honorable court and petitioner prays for such relief as it may be entitled to herein.

Respectfully submitted,

FRANK S. QUINN,
WILLIAM H. ARNOLD,
WILLIAM H. ARNOLD, JR.,
DAVID C. ARNOLD,
Solicitors for Petitioner.

Texarkana, Arkansas.
January 28th, 1922.

INDEX.

Page

Argument on Principal Question.....34-88

After a non-resident of Arkansas has lawfully brought a suit in the Federal Court as provided in the Constitutional Laws of Congress, on the subject, against a citizen of Arkansas for breach of a contract by said citizen of Arkansas, can said citizen of Arkansas remove the cause from the Federal to the State Court, thereby depriving the former of its lawfully acquired jurisdiction by bringing in the State Court a suit for damages on the same contract, leaving nothing to be determined in the Federal Court, if the suit in the State Court is decided first? 86

Brief of the Argument 23

Comity 19

Does the action of the citizen of Arkansas, in making the sureties on the bond parties in the State Court, when one of said sureties, the surety company, the real surety (The United States Fidelity and Guaranty Company) is a non-resident of Arkansas, and hence could be easily made a party in said citizens cross complaint in the Federal Court, in any manner lessen the right of the non-resident plaintiff to bring and maintain his suit in the Federal Court?..... 87

Page

Do the facts in this cause bring it within the principles above indicated and within the rules of this court in Looney vs. Eastern Texas Railroad Company, 247 U. S. 214, where this court said: "The use of the writ of injunction by Federal Courts first acquiring jurisdiction over the parties, or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice? 89

Does this record show that the purpose of the petitioners in bringing suit No. 692 was to prevent the trial of respondent's case in the United States Court, and thus deprive respondent of its constitutional right to try its case in the United States Court, and that court of its jurisdiction? 89

Have the Federal Courts of the United States, having first acquired jurisdiction over the parties and the subject matter of a suit, the power and right under Sections 1 and 2 of Article III of the Constitution of the United States, and the valid Laws of Congress made in pursuance thereof, to use the writ of injunction, for the purpose of protecting and preserving the Federal jurisdiction until the object of the suit is accomplished and complete justice done between the parties? 34

Principal Question, Argument on 34-88

Principal Question (Stated) 6

Proceedings in the Two Cases 11

INDEX.

Page

Questions Involved 20

Statement of the Case 1

Suit 692 5

The substantial issues in the two cases are precisely the same 23

The purpose of petitioners in bringing suit No. 692 in the State Chancery Court was to evade the trial in the Federal Court, and to deny to respondent a right granted to it by the Federal Constitution 93

The Surety Bond 28

CITATION OF CASES.

Allen vs. St. L. I. M. & S. Ry. Co., 230 U. S. 553.. 67

Burke Construction Co. vs. Kline, 271 Fed. 605... 42

Buck vs. Colbath, 70 U. S. 334..... 63

B. & O. R. R. Co. vs. Wabash R. R. Co., 119 Fed. 678 81

Barber Asphalt Co. vs. Morris, 132 Fed. 948..... 83

Bunkerhill & Sullivan Mining Co. vs. Shoshone Mining Co., 109 Fed. 504..... 84

Burke Const. Co. vs. Paving Imp. Dist. No. 5, 120 Ark. 435 89

Chicot County vs. Sherwood, 148 U. S. 529..... 44

C. & O. R. R. Co. vs. McCabe, 213 U. S. 207..... 45

Central Trust Co. vs. St. L. A. & T. R. R., 59 Fed. 385 46

C. & O. R. R. Co. vs. McCabe, 213 U. S. 207..... 53

Page

Clerk vs. Five Hundred and Five Thousand Feet of Lumber, 65 Fed. 236..... 54

Crittenden vs. Brewster, 2 Wall. 191..... 54

Covell vs. Heyman, 111 U. S. 176..... 55

C. R. I. & P. R. R. Co. vs. Hardwick F. El. Co., 226 U. S. 426 56

City of Mankato vs. Barber Asphalt Paving Co., 142 Fed. 340 85

Dietzsch vs. Hydekoper, 103 U. S. 494..... 49

English vs. Shelby, 116 Ark. 212.....30, 87

French vs. May, 22 Wall. 231..... 45

Fidelity Ins. Co. vs. N. & W. R. R. Co., 88 Fed. 815 46

Freeman vs. Howe, 24 How. 450.....54, 64

Gordon vs. Longest, 16 Peters, 97.....35, 53

Guardian Trust Co. vs. K. C. S., 171 Fed. 43..... 54

Gibbons vs. Ogden, 9 Wheat. 1..... 56

Gordon vs. Gilfoil, 99 U. S. 168.....62, 63

Gates vs. Bucki, 53 Fed. 961..... 84

Green vs. Underwood, 86 Fed. 429..... 84

H. E. & W. T. R. R. Co. vs. United States, 234 U. S. 342 42

Harkrader vs. Wadley, 172 U. S. 148, 164, 19 Sup. Ct. 119, 43 L. Ed. 399..... 85

Hunt vs. New York Cotton Exchange, 205 U. S. 322 65

Holmes County vs. Burton Const. Co., 272 Fed. 565 83

Harkrader vs. Wadley, 172 U. S. 148 54

In re Lasserot, 240 Fed. 325..... 86

Julian vs. Central Trust Co., 193 U. S. 93..... 45

Page

Jackson vs. Parkersburg Etc. Elec. Ry. Co., 233 Fed. 784 54

Kendrick vs. Moss (Tenn.), 58 S. W. Rep. 127, s. c., 104 Tenn. 376. 31

Knott vs. C. B. & Q. R. R. Co., 230 U. S. 474. . . . 46

K. C. Gas Co. vs. K. C., 198 Fed. 500. 54

Knott vs. Evening Post, 124 Fed. 342. 54

Looney vs. Eastern Texas R. R. Co., 247 Fed. 214 . . . . . 42, 89

Louisiana R. R. Comm. vs. Texas Etc. R. R., 144 Fed. 68 54

Mississippi Mills vs. Cohn, 150 Fed. 202. 45

Mankato vs. Barber Asphalt Pav. Co. (8th Cir.), 142 Fed. 340 51

Mutual Life Ins. Co. vs. Harris, 96 U. S. 588. 62

Merritt vs. Steel Barge Co., 79 Fed. 228. 72

McClellan vs. Carland, 217 U. S. 268. 86

Orton vs. Smith, 18 How. 263, 265. 54

Ogden City vs. Weaver, 108 Fed. 564. 78

Prout vs. Starr, 188 U. S. 537. . . . . 52, 54

Peck vs. Jenness, 7 How. 612, 622, 625. . . . . 54, 56

Rickey Land & C. Co. vs. Miller & Lux, 218 U. S. 258 51

Root vs. Woolworth, 150 U. S. 401. 53

State Bank vs. Robinson, 13 Ark. 214. 29

State Trust Co. vs. K. C. P. & G. R. R. Co., 110 Fed. 10 46

Sharon vs. Terry, 36 Fed. 337. . . . . 46, 76

Smith vs. Ames, 169 U. S. 466. 53

Page

Stewart vs. Wis. R. R. Co., 117 Fed. 782..... 53

St. L. Mining Co. vs. Montana Min. Co., 148 Fed. 450 54

Starr vs. C. R. I. & P. R. R. Co., 110 Fed. 3..... 54

Simpson vs. Shepard, 230 U. S. 352..... 56

Southern R. Co. vs. Reid, 222 U. S. 424..... 56

Stanton vs. Emery, 93 U. S. 548..... 62

St. L. I. M. & S. R. R. Co. vs. McKnight et al., 244 U. S. 368 67

Stewart W. E. Land Co. vs. Arthur, 267 Fed. 184. 70

Taylor vs. Carryl, 20 How. 583..... 56

United States vs. Peters, 5 Cranch, 115..... 54

Wells Fargo & Co. vs. Taylor, 254 U. S. 175..... 45

Wallace vs. McConnell, 13 Pet. 135, 10 L. Ed. 95.. 54

Wiswall vs. Sampson, 14 How. 52..... 54

Woren vs. Witherbee, 240 Fed. 1013..... 85

Zimmerman vs. SoRelle, 80 Fed. 417..... 84

5 Fed. Stat. Ann. 959, and cases cited on page 964. 53

15 Corp. Jur. Subject Courts, Sec. 583, pp. 1134, 1139, and cases there cited..... 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No 321, October Term, 1921.

JOHN P. KLINE, MILTON WINHAM AND PAUL G. HUCKINS, AS THE BOARD OF IMPROVEMENT OF PAVING DISTRICT NUMBER 20, OF THE CITY OF TEXARKANA, ARKANSAS, PETITIONERS,

VS.

BURKE CONSTRUCTION COMPANY, RESPONDENT.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The statement made by the petitioners in their brief does not present to this court the whole case. The figures in parentheses herein refer to the printed pages of the transcript. The Board of Improvement and the

members thereof as such will be referred to as petitioners. The Burke Construction Company will be referred to as respondent.

Three suits are involved in this controversy. The first was brought by the respondent, as hereinafter explained, and will be referred to for brevity as suit 439. The second was brought by the petitioners *subsequent* to 439, and in the State Chancery Court, and for the same relief claimed by the petitioners in 439. This suit in the State Chancery Court is numbered 692, and will be referred to by that number. The present suit (referred to as 47) is a suit in equity by the respondent as an ancillary proceeding to 439, and brought to enjoin the petitioners from interfering with the Federal rights of the respondent, and the jurisdiction of the Federal Court in 439.

On November 29, 1916, the respondent, a corporation organized under the laws of the State of Missouri, and lawfully authorized to do business in the State of Arkansas (See *Terral* v. *Burke Construction Company*, recently decided by this court and not yet reported) entered into a valid contract with the petitioners for the construction of certain pavements and other street improvements in the City of Texarkana, Miller County, Arkansas, the cost of which improvements was estimated to be about $150,000.00. In the original contract, the improvements were to be completed within one year. Owing to war conditions (41) and other causes, the improvements were not completed within the time originally contemplated, and by consent of all parties (95) the

time for the completion of said improvements was extended. The respondent continued the performance of its contract under the terms thereof, and strictly, as it claimed, until February 9, 1920. *On that day* (108), *the petitioners, claiming that respondent was abandoning the work, and was not performing its contract, stopped respondent from further work* (42, 51, 108, 109), *put respondent out of possession of the work, took possession of all respondent's machinery, tools and material, and denied the respondent the right to proceed further with the work, claiming* (*See their complaint in* 692, *page* 109) *that they would complete the work themselves.* Thereupon, the respondent, claiming that said action of the petitioners was wrongful and a breach of the contract, and claiming other breaches of the contract, immediately brought suit in the United States District Court, Western District of Arkansas, Texarkana Division, alleging the various breaches of the contract, including said action above referred to, and claiming damages against the petitioners, by reason of said breaches, including the conversion (42 and 51) in the sum of $114,331.60 (53). The next term of said United States Court at which there could be a trial of said cause opened the second Monday in May, 1920, which was May 13. The usual summons was issued, and at once served upon the petitioners. On April 27, 1920 (54), respondent filed an amended complaint. On May 13, (100) being the first day of the term of the Federal Court, both parties appeared, the petitioners having moved to quash the service of summons. The court permitted amend-

ments and the dilatory motion of the petitioners was overruled. On May 15 (101), other proceedings were had in the cause. Petitioners filed a motion to require the respondent to paragraph and number its complaint. That motion was overruled (101). At about the same time, and before answering, the petitioners (102) filed a motion to require the respondent to give bond for costs. That motion was conceded, and the bond given. At the same time, the petitioners filed another motion (102) to strike out certain parts of the complaint. That motion was overruled. The petitioners also filed (102) a motion to require the respondent to make its complaint more definite and certain. That motion was also overruled. There being no further dilatory motions known to the code, the petitioners answered, and filed a cross complaint on July 2, 1920. This answer and cross complaint is found on pages 54 to 89 inclusive. *Prior to the filing of that answer and cross complaint, and on May* 17, 1920 (101), *by consent of both parties, suit* 439 *was set down for trial in the Federal Court on July* 20, 1920. On that day (102), petitioners filed a motion to transfer suit 439 to the equity side of the docket in the Federal Court. That motion was overruled. Thereupon, a trial was had (103) before the court and a jury, and after ten days were consumed in said trial, the jury disagreed, and no verdict was rendered. It is alleged in the complaint in this suit, which will be referred to as suit 47, that the jury stood ten to one in favor of the respondent. Only eleven men were on the jury (5). The court in that trial submitted to the jury every issue

raised by the complaint, the answer and the cross complaint. In addition, certain special interrogatories were submitted to the jury on request of petitioners (105). The trial ended, and the jury were discharged on July 29 (105). The next term of the court, without an adjourned term, when the cause could be tried was the second Monday in November of that year, which was November 8.

Suit 692.

In order to present the questions here involved as they arose, it is necessary now to refer to the case brought by the petitioners in the State Chancery Court. It will be remembered from the statements above and from an inspection of the record that the petitioners had refused to permit the respondent further to proceed with the work, and that the petitioners had taken the work over for the purpose, as they say in one pleading, to complete the same. See page 109 where that statement appears in the complaint in suit 692. In the answer in 439 a similar statement is made by petitioners (81). In the same answer and cross complaint (77), it is again admitted that the property of the respondent was taken over, and that respondent was put off the work. Notwithstanding the above allegations as to the object of taking over the work, petitioners alleged in their answer in 439 (76) that the only object in taking possession was to terminate the contract. They assert that they did that because the contract had already been abandoned by the respondent, and violated also by said respondent.

With suit 439 already pending in the Federal Court, and with service upon the petitioners in that court, and with the twenty days allowed for answer or other pleading having expired, and on March 19, 1920 (119), petitioners filed a bill of complaint on the same contract, setting up the same causes of action and praying for the same relief as that covered by suit 439. For bill of complaint in 692, see pages 106 to 119. For answer and cross complaint in 439, see pages 54 to 89. Substantially, the same alleged breaches of the contract by respondent are set up in each of these pleadings. In the cross complaint (89), the petitioners prayed judgment for damages for breaches of the contract in the total sum of $99,498.36. In the bill of complaint in 692 (112), they claim damages for breach of the same contract by the respondent in the sum of $80,000.00. In the cross complaint in 439 (89), there is a motion and a prayer that the cause be transferred to equity. That was insisted upon, but denied by the Federal Court (102). The only difference between the answer and cross complaint of petitioners in 439 and their bill of complaint in 692 is that in the latter they make M. C. Burke and J. A. Burke and the United States Fidelity and Guaranty Company, a corporation of Maryland, parties defendant in the State Chancery Court.

Principal Question.

The principal question involved is whether under Sections 1 and 2 of Article III of the Constitution of the United States, the Federal Courts,

first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving their jurisdiction until the object of the suit is accomplished, may issue injunctions enjoining parties to the suit in the Federal Court (over which that court has jurisdiction) from proceeding with the trial of a subsequent suit brought in the State Court on the same contract, the necessary result of the case in the State Court being to leave the Federal Court without anything to decide or adjudicate. Inhering in that question is the further question of whether the states, either by legislative enactments or by judicial decisions, may destroy the jurisdiction of the Federal Court which jurisdiction is imposed upon said Federal Courts by the Sections of the United States Constitution above referred to. There necessarily arises in the determination of those two questions the further point as to whether a citizen of the State of Missouri, a nonresident in Arkansas, authorized to do business in the latter state, may by state action be deprived of the Federal constitutional right to bring and maintain his suit in the Federal Court. *It is the contention of the respondent that neither the legislative, nor the executive nor the judicial power of a state may so act as to impair, defeat or take away the Constitutional Federal right of a citizen of one state to bring and maintain a suit in the Federal Court of another state.*

Other incidental questions are involved. It is deemed essential to make a little further detailed statement of the facts.

In the case of *Terral* v. *Burke Construction Company* (recently decided by this court), it was at first denied that the Burke Construction Company was a corporation organized under the laws of the State of Missouri. Later, however, in that case, that fact was admitted. In the present case, the answer (10) denies that the respondent is a corporation organized under the laws of the State of Missouri but later admit it (85). In the same answer, petitioners admit, in effect, that they were instrumental in an effort to have the Secretary of State forfeit the license of the respondent on the ground that it (a foreign corporation) had brought a suit in the United States Court (15). In the same answer, petitioners deny that they *wrongfully* persuaded the Secretary of State to forfeit respondent's license, and allege that the respondent, at that time, had no legal right to do business in Arkansas because it "(16) had breached its agreement not to bring suit against a resident of the State of Arkansas, and had violated the laws of Arkansas by bringing said suit at law No. 439 against these defendants who were then residents of said state." It is then alleged that the petitioners had the right, and still have the right, to insist that the respondent comply with the laws of Arkansas, and that the Secretary of State should forfeit its license. It is further alleged that the case of *Terral* v. *Burke Construction Company* had been appealed to this court. The proceedings in 692 and the method of securing service upon the respondent in that case (120 and 121) show that the petitioners asserted, as they did in their bill of complaint in that case, that

the respondent was a foreign corporation in Arkansas (106). At the time of the making of the contract hereinafter referred to, and ever since, the respondent had fully complied with the laws of Arkansas, and had the legal right to do business in that state, notwithstanding the repeated efforts of the petitioners to have that right forfeited, and to prevent the respondent from the exercise of its constitutional right to bring and maintain its suit in the United States Court. In the answer and cross complaint, apparently, the petitioners deny their existence as a body politic and corporate under the laws of Arkansas. Later on, however, in the same complaint, it is admitted that they exist as a body politic and corporate, created under the Arkansas laws, for the purpose of making the public improvements elsewhere described. The existence of petitioners as such Board of Improvement is also asserted (106) in the bill of complaint in 692. The contract on page 92 between respondent and petitioners shows on its face that petitioners recognize respondent as a Missouri corporation. In numerous other ways, throughout all of these cases, the petitioners recognize the respondent as a Missouri corporation.

Under Section 5710 of Crawford & Moses Digest of the Statutes of Arkansas, the petitioners had the right to award the contract for the construction of these improvements to the respondent. Under Section 5737 of the same Digest, the respondent was required to give a good and sufficient bond in double the amount of the contract work. The respondent gave such bond with

the United States Fidelity & Guaranty Company of Baltimore, Maryland, a non-resident of Arkansas, as surety, said bond being in the sum of $300,000.00 (114). Said bond was a surety bond, as stated by petitioners (11). Petitioners admitted in their answer (11) that they accepted and approved the bond. Hence, petitioners admit that the United States Fidelity & Guaranty Company of Maryland is solvent to the extent of $300,000.00, over and above its liabilities, and further admit that said bond was ample and a complete protection to the petitioners in the event that it should be ultimately determined that there was due anything from the respondent to the petitioners. As before stated, the answer of petitioners in effect admits that said bond is a surety or guaranty bond (11). It is further admitted in said answer (13) that the purpose of bringing the suit in the State Chancery Court was to recover "upon said bond the amount of damages due on account of breach of said contract." The contract could be breached only by the respondent or petitioners and not by the bondsmen. Hence, the suit on the bond is solely for the purpose of recovering *damages* caused by respondent's breach. Hence, before there can be a recovery, on the bond, petitioners must first establish a breach of the contract by respondent. The alleged breach of the contract is set forth in the answer and counterclaim in suit No. 439.

PROCEEDINGS IN THE TWO CASES.

It is deemed essential to give the court a brief statement of the proceedings in each case, as such proceedings will be important in showing how the questions here to be determined were brought about. As before stated (108) petitioners admit that they put the respondent off the work and took possession of the property on February 9, 1920. The complaint in No. 439 was sworn to on February 14, 1920 (31). The said complaint was filed and summons issued and served thereon, on February 16, 1920. So far as this record shows, the first step taken by the petitioners in No. 439 was on May 13, 1920, and that was a motion to quash the service of summons (100). The clear purpose of that motion was delay. The court found the summons informal and authorized its amendment (101). May 13, 1920 was the first day of the Federal Court. On that day the petitioners were granted time in which to further plead (100). On the next day the petitioners secured a dismissal of the cause as to Kline, Huckins and Winham as individuals. All this was done at the cost of the respondent. On May 17 (101), there came on for hearing the motion of the petitioners, requesting respondent to paragraph and number its complaint. That was another dilatory motion, and the same was overruled. On that day and by consent (101) the cause was set for trial *in the Federal Court* on July 20, 1920. Therefore, the

petitioners had knowledge of the setting, and had knowledge that case No. 439 would be tried. The identity of the two cases will be discussed elsewhere. On May 18 (102) there came on for disposition the motion of petitioners to require the respondent to give bond for costs. The motion was conceded and the bond filed. Apparently on the same day there came on for hearing a motion of the petitioners to strike out certain parts of the complaint. That is another dilatory motion, and was overruled. The petitioners then filed a motion to require respondent to make its complaint more definite and certain. On June 14, 1920 (102) that motion was overruled. Some time between that date and apparently on July 2, 1920, the petitioners filed an answer in said suit 439, no other dilatory motion being known to the code of practice. After the answer was filed, and on July 20, 1920, the very day of the trial, petitioners moved the court to transfer the cause to equity. The motion was overruled and the cause went to trial. The trial of the case extended to and included July 29, 1920 (104). On that day the petitioners renewed their motion to transfer to equity, which was again overruled. That case was tried on the issues made in the complaint (31), and the answer and cross complaint (48). *Every issue that could arise out of the contract, its performance or its breach, was submitted to the jury.* At the request of the petitioners (105), specific questions were submitted to the jury, on which they would find whether the respondent had broken the contract, or whether the petitioners had broken it, and necessarily the amount of

damages that would accrue to the one who had not broken the contract. The next term of the court at which a trial could be had in No. 439, was the second Monday in November, 1920, which was November 8.

In the mean time we should ascertain what was being done in suit No. 692. The bill of complaint, as shown on page 119 of the transcript, was filed and summons issued out of the Chancery Court on March 19, 1920. Section 1139 of Crawford & Moses Digest of the Arkansas Statutes provides that the time fixed in the summons for the defendant to answer shall be within twenty days after service. Section 1140 makes the summons returnable to the first day that the court shall be in session after twenty days after the date of the issuance of the summons. Section 1208 requires the defense to be filed on or before noon of the first day of the regular or adjourned term. Consequently there is some uncertainty as to just when the answer will be due, depending upon whether there is an adjourned term. Under Section 1288, equitable actions (and No. 692 as drawn was an equitable action), stand for trial *after ninety days after the pleadings have been completed.* Petitioners state in their answer (14) that the demurrers in No. 692 were overruled by the Chancery Court on June 17, 1920, and that the answers of defendants in that cause were to be filed within two weeks thereafter, and that respondent and some of the sureties filed their answer on July 1, 1920, and that the surety company filed its answer later. *According to the statutes of the state therefore, suit 692 would not stand for trial until Oc-*

tober 1, 1920. In said suit No. 692 the return of the summons shows service on Tom J. Terral (121), Secretary of State at Little Rock, as and for the Burke Construction Company, a foreign corporation, on March 20, 1920, the day after the issuance of said service of said summons at Texarkana. This shows very quick service. Attempt was made also to serve the respondent at Fort Smith in Sebastian County (120). The surety company was served both at Little Rock, and in Texarkana (121-122). The Burke Construction Company on April 9, 1920, filed in the Clerk's office of the Chancery Court in suit No. 692 (127) a petition and bond for removal. The respondent asserted that the controversy between it and the petitioners was a seperable controversy, and that the different citizenship of the parties entitled the respondent to remove said cause to the Federal Court (123). *Removal was also sought on the ground that a Federal question was involved.* The complaint in No. 692 showed that the Burke Construction Company was a foreign corporation, and that it had brought suit on the same contract, alleging damages against the petitioners and claiming that the petitioners had broken the contract. The removal was therefore sought on the ground that the complaint on its face showed that a Federal question was involved. In said petition for removal, it was alleged that there was but one controversy growing out of the contract, and that the respondent was entitled to bring and maintain its suit No. 439 in the United States Court, and could not be deprived of that right granted by a Constitutional

Act of Congress by the bringing of said suit No. 692 in the State Chancery Court. The State Chancery Court, the exact date not being shown (127) sustained the removal. On May 1, the transcript (128) was filed in the Federal Court. On the first day of the Federal Court the petitioners (192) filed a motion to remand said cause. On May 14, 1920 (129) the second day of court the Federal Court sustained the motion to remand, the reason therefor not being shown in the record. On the third day thereafter (192) petitioners filed the mandate in the State Court. Notwithstanding proceedings were being had almost every day in No. 439, *the State Chancery Court proceeded also to hear motions and pleadings in the State Chancery Court* (130). On May 25, and on June 2, in No. 692 Chancery Court, motions of the respondent were overruled. On June 17, 1920, respondent's demurrer in No. 692 was overruled in part and sustained in part. The record apparently does not show any filing of any amended complaint.

The next step appears from the answer of petitioners in the present suit No. 47. After alleging on page 15 that counsel for the respondent refused to agree to take depositions in No. 692, petitioners alleged that it was necessary to give notice to respondent that petitioners would proceed with the taking of testimony and fixing the date of August 31, 1920, notwithstanding the fact that under a reasonable construction of Section 1288, of Crawford & Moses Digest, the case could not in due course, be tried before October 1, ninety days after the answers were filed. If that point be waived, it

does appear then, that notice was given that depositions would be taken *before the chancellor in open court on August 31st.* Upon receipt of that notice the respondent filed the bill of complaint in the present case (4), which was on August 24, 1920, and notified petitioners that respondent would apply to Judge Youmans on August 30 for a preliminary injunction. On August 30, 1920, both parties appeared before Judge Youmans, petitioners (10), filing the answer heretofore referred to. A trial was had on the application for a preliminary injunction upon notice and the injunction denied. Immediate notice was given that respondent would appeal from the order of the court to the Circuit Court of Appeals. The petition and other necessary papers to complete the appeal were prepared and sworn to on August 31 (151). All of these papers were filed, including the bond, which was approved on September 3rd, and citation issued and service thereof accepted on the same day. See pages 3, 148 and 155. Service of the citation was accepted by telegram sent by counsel for petitioners to the clerk of the court from Texarkana (3). In the citation signed by the trial judge, notice was given that respondent would apply to the Circuit Court of Appeals of the Eighth Circuit at Denver *on September 7, 1920,* for a preliminary injunction. This notice was accepted, and both parties appeared in Denver in the Circuit Court of Appeals *on September 8* (157). On that day petitioners filed a response to the application for preliminary injunction, resisting the same. On that day the application for preliminary injunction was argued and submitted by counsel on both sides.

In the mean time we should see what the State Court was doing. On August 31, (131) 1920, being the day that the appeal papers were being prepared by this counsel, for presenting the important questions to the Circuit Court of Appeals of the Eighth Circuit, the State Chancery Court at Texarkana proceeded to make an important order in No. 692. Apparently overlooking the state statute heretofore noticed, the Chancery Court ordered "that the parties proceed with the taking of depositions herein, and the court orders that said depositions be taken in shorthand *in open court.*" The records show that the hearing before Judge Youmans on August 30th was had at Fort Smith. It also shows that counsel for the petitioners appeared before Judge Youmans. This order in No. 692, last referred to, was had at Texarkana, one hundred and sixty miles distant from Fort Smith. It would be unreasonable to suggest that the State Chancellor did not have knowledge of what was being done in the case in the Federal Court. That order, if it had been literally pursued, would have prevented counsel for respondent either to prepare the appeal papers in case No. 47, or to present same to the Court of Appeals at Denver. The said order is *without qualification and means a continuous hearing from that date on.* It therefore applies to September 3, and the dates thereafter, notwithstanding the granting of the appeal by Judge Youmans on September 3, 1920, had removed suit No. 47 to the Court of Appeals of the Eighth Circuit at Denver. It is well to observe what petitioners say relating to that order, and what was done under it.

In petitioners' motion (162) praying an injunction against respondent enjoining it from proceeding to the trial of case No. 439, it is stated that "Thereafter, on August 31, 1920, *this defendant proceeded to take its testimony in the Chancery Court of Miller County, Arkansas, before Honorable J. D. Shaver, Chancellor, and occupied about four days in taking said testimony.*" It is therefore apparent from that statement, that the taking of petitioners' evidence was hurried along, notwithstanding the appeal in No. 47 to the Circuit Court of Appeals. As is shown in the application to advance this cause, the petitioners secured a continuance of No. 439 at the November Term, 1920. At the May Term, 1921, the judge was ill, and hence no cause could be tried. On January 12, 1921, this cause was argued orally before the Court of Appeals by counsel for petitioners in St. Louis. On March 18, 1921, the Circuit Court of Appeals made the injunction permanent, the opinion of the court appearing in this record at page 171. At the November Term, 1920, the District Court had continued the cause to await the decision of this cause No. 47 by the Court of Appeals. Notwithstanding the decision of this cause adversely to the petitioners, as above shown, the petitioners then, at the November Term, 1921, secured another continuance until the May Term, 1922. A hearing on the motion for a continuance was had at Fort Smith before Judge Youmans. The Judge announced that he would make an order of continuance on November 14, at Texarkana, the first day of court. Thereupon, the respondent applied to the Court of Ap-

peals for a writ of mandamus, compelling Judge Youmans to proceed with the trial of this cause, relying upon the case of *McClellan* v. *Carland*, 217 U. S. 268. The court denied the application. There are other facts to which the court's attention should be called, but they will be noticed in the brief of argument below.

Comity.

The respondent in its answer in the State Court (133) set up the defense that as petitioners had taken over the work to complete it, the action in that court was premature as petitioners could not determine their damages until the work was completed, and in addition appealed to the doctrine of comity setting up (133) the pendency of the prior suit in the Federal Court and praying the staying of the cause in the State Court, because of the prior action in the Federal Court. Apparently the only response to that appeal to comity was the State Court's order made August 31, 1920 (131) to proceed with *depositions* in open court.

QUESTIONS INVOLVED.

Substantially, though not in exact language, the following questions are involved:

1.

The substantial issues in the two cases are precisely the same.

2.

Have the Federal Courts of the United States, having first acquired jurisdiction over the parties and the subject matter of a suit, the power and right under Sections 1 and 2 of Article III of the Constitution of the United States, and the valid Laws of Congress made in pursuance thereof, to use the writ of injunction, for the purpose of protecting and preserving that Federal jurisdiction until the object of the suit is accomplished and complete justice done between the parties?

3.

After a non-resident of Arkansas has lawfully brought a suit in the Federal Court as provided in the constitutional laws of Congress, on the subject, against a citizen of Arkansas for breach of a contract by said citizen of Arkansas, and said citizen of Arkansas by bringing a suit on the same contract in the State Court *remove the cause from the Federal to the State Court, thereby depriving the former of its* lawfully acquired jurisdiction and by such bringing, in the State Court, of

a suit for damages on the same contract leaving nothing to be determined in the Federal Court, if the suit in the State Court is decided first?

4.

Does the action of the citizen of Arkansas, in making the sureties on the bond parties in the State Court, when one of said sureties, the surety company, the real surety (The United States Fidelity and Guaranty Company) is a non-resident of Arkansas, and hence could be easily made a party in said citizen's cross-complaint in the Federal Court, in any manner lessen the right of the non-resident plaintiff to bring and maintain his suit in the Federal Court?

5.

Do the facts in this cause bring it within the principles above indicated and within the rules of this court in *Looney* v. *Eastern Texas Railroad Company*, 247 U. S. 214, where this court said: "The use of the writ of injunction by Federal Courts first acquiring jurisdiction over the parties, or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice."

6.

Does this record show that the purpose of the petitioners in bringing suit No. 692 was to prevent the trial

of respondent's case in the United States Court, and thus deprive respondent of its constitutional right to try its case in the United States Court?

7.

The purpose of petitioners in bringing suit No. 692 in the State Chancery Court was to evade a trial in the Federal Court, and to deny to respondent a right granted to it by the Federal Constitution.

BRIEF OF THE ARGUMENT.

I.

The substantial issues in the two cases are precisely the same.

It is demonstrated, if not admitted, that the final trial of the questions involved in either No. 439 or No. 692, will forever settle all controversy between the parties to that contract and leave nothing for determination in any other court. Each party is seeking to recover a large amount of damages from the other party, each claiming that the other broke the contract, and damaged the other thereby. The principal question is one of fact, and that is, which party first broke the contract. If the petitioners broke the contract first, there will be no cause of action against the respondent or its surety. The United States Fidelity & Guaranty Company is the real surety, and the one upon which petitioners rely. That surety is a foreign corporation, authorized to do business in Arkansas, and it may yet be made a party defendant in cause No. 439. Each party insists that the other broke the contract. *It is admitted that the cause was brought in the Federal Court first, and was brought to an issue first in that court.* Petitioners insist in the Federal Court, that the cause should be transferred to equity. That is an admission that the same questions involved in suit No. 692 are the ones involved in No. 439. An examination of the answer

and cross-complaint in No. 439, as stated, will demonstrate that the issues are the same in that cause as in No. 692. In the answer and counter-complaint in No. 439 petitioners deny that the Burke Construction Company is a corporation organized under the laws of Missouri (54). In No. 692 it is alleged that the respondent is a foreign corporation. In paragraph 1, of the answer and counterclaim (54), petitioners admit the organization of the district. They admit the making of the contract. Paragraph 2 is made up largely of denials (57), but also contains some admissions. Paragraph 3 denies the item of interference with water pipes, and also contains some other denials. The remaining paragraphs down to the counterclaim are in part denials and in part admissions. *It is perfectly clear from these paragraphs that there was a contract made, and that respondent claims that it was broken by petitioners and petitioners claim that it was broken by the respondent.* In paragraph 14 appears the allegation of notice to the Surety Company, the United States Fidelity & Guaranty Company, which is the real surety in this case. The remainder of that paragraph refers to the extension agreements, and also sets out Section 16 of the contract *and alleges the taking possession of the work and property by the petitioners.* Section 16 admits the existence of the board as a quasi corporation, and claims that the district cannot be made to respond in damages. That claim was denied by the court, and has been denied by all other courts that have passed on the question. That matter, however, is not material here. The counter-

claim begins on page 84. *Said counterclaim sets up all of the breaches of the contract by the respondent theretofore referred to.* Reference is also made to the extensions of the contract, and the amount of work yet to be done is set out on page 85. It is there claimed that the petitioners are damaged by respondent's breach of the contract in the sum of $88,951.31. Thereafter the specific grounds upon which said damages are claimed are set forth, and in conclusion the petitioners in said counterclaim pray for damages in the sum of $99,498.36.

In this connection, the complaint in No. 692 should be examined. It starts out by alleging the creation of the petitioners as a legal entity, and alleging that the respondent is a foreign corporation, and that the United States Fidelity & Guaranty Company is also a foreign corporation, being a corporation organized under the laws of the State of Maryland. It also alleges that M. C. Burke and J. A. Burke are sureties on the bond. As in the counterclaim in No. 439, it is alleged (107) that a surety bond in the sum of $300,000.00 was given, *"conditioned that said defendant, Burke Construction Company, would faithfully perform its contract to construct and put in the street improvements and paving in said Paving Improvement District No. 20, according to the contract and specifications."* It is then alleged that M. C. Burke and J. A. Burke, as co-partners, signed said bond as *sureties* thereon. A copy of the bond is referred to as attached to the contract between petitioners and the respondent, for the construction of the improvement. The extensions are then referred to in

the same way as they are referred to in the counterclaim. It is then alleged that the respondent entered upon the construction of the work, and finally, in December, 1919, abandoned the work, broke its contract and notified the petitioners that it would not return to complete the work unless the petitioners discharged their engineer. *It is then alleged, as in the counterclaim, that the petitioners took over the work, taking possession of respondent's property and retaining the same in the hands of the petitioners.* A list of the property taken over is attached and is found on page 118, being the same property referred to in No. 439 on page 51 of the transcript. It is then alleged that it was the purpose of the petitioners to take over the work and complete it, *and that after they had exhausted their funds, they would then call upon the Burke Construction Company and the sureties on its bond for an amount of money sufficient to complete the work.* It is alleged that the respondent and the sureties were so notified. It is then alleged that the petitioners may not be able to complete the work, *because of the prior suit brought by the respondent in the Federal Court.* It is then alleged that the respondent broke its contract, failed and neglected to complete and finish the work within the specified time and abandoned the same, and thereby damaged the petitioners in the sum claimed. The said complaint frequently refers to an accounting. But the facts upon which an accounting should be had are not sufficiently shown. It appears from said complaint in suit No. 692 that it is an issue of fact throughout. It is first an issue of fact as to which party broke the contract, and second as to the amount of damages done by

the breach, and as to the amount of damages done on each item claimed in each paragraph. The following language, it is respectfully submitted, shows the absolute identity in every way of the two suits, which language is found in said complaint No. 692, beginning on page 110. It is:

> *"There is a conflict between the theories of the plaintiff and the defendant, Burke Construction Company, with reference to the kind and character of work, and as to the materials to be used which the contract calls for, which involves the taking of much testimony and the statement of accounts upon the theory of each party upon practically every subject of said contract, including the character, quality and kind of curbing, guttering, the quantity and quality of gravel and the expense of preparing the same for use; the kind, quantity and quality of asphalt, asphalt macadam and brick work;* and in general there is a conflict between plaintiff and defendant upon many subjects arising under said contract, and there will be much accounting required *with reference to the amount for which plaintiff is entitled to recover to complete said contract abandoned by the defendant as aforesaid."*

In addition, on page 12 of the transcript, and in the answer of petitioners, and as tending to show that the trial in the State Court will settle everything, this language appears:

> "The defendant (petitioners) is advised that they had the right to bring suit upon said bond, for the collection of the *damages* which would be found by the chancery court of Miller County, Arkansas, *in a settlement of all the issues and matters involved between the Burke Construction Company and this defendant."*

It does not seem necessary to refer to any other provision than that to show that a trial of one of the causes will absolutely settle every issue between the two parties. The petitioners then pray judgment for the sum of $80,000.00 damages against the respondent and the surety.

Upon the above facts and upon the authorities hereinafter referred to, it is respectfully submitted that the trial and determination of either of these cases will forever settle every issue which is involved, between petitioners and respondent.

The Surety Bond.

A consideration of the nature of the bond will show that the addition of the sureties as parties in suit No. 692 will make no difference in the relief sought for by the respondent. The question involved is not between the petitioners and the surety. It is first between the petitioners and the respondent. The bond is a surety or guaranty bond only. The sureties are not necessary parties in the determination of the issues between the petitioners and the respondent. The statements in the answer of petitioners appearing on pages 11 and 12 and elsewhere, show that the bond is a mere *surety* bond. If the respondent wins in No. 439, no cause of action exists against the surety. If the petitioners win in No. 439, they will then have a right of action against the surety. They can bring the United States Fidelity & Guaranty Company into No. 439, and have the entire matter determined against the respondent, as well as that surety

company, if they so desire. The fact that they have not done so, shows that they do not desire to have settled in No. 439 the question of the liability of the surety company. The reason is they want to avoid a trial in the Federal Court. Petitioners discuss this question beginning on page 45 of their brief, and contend that the contract is both joint and several, and therefore that the adjudication in No. 439 will not settle the controversy as against the bondsmen. If the contract is joint and several, as they contend on pages 46 and 47 of their brief, then the petitioners have the right to make the United States Fidelity & Guaranty Company a party and settle every controversy, *even as to the surety* in suit 439. That question, however, is a collateral one to the main question in this case.

Petitioners rely upon the case of *State Bank* v. *Robinson*, 13 Ark. 214, in order to show that the issues in the two cases here are different. It is respectfully submitted that said case is not in point at all on the subject. There is an Arkansas case which I cite below, which is in point. The Robinson case just cited expressly points out that whether or not a judgment against the principal will determine the liability against the surety is to be determined by the nature of the contract. After discussing the authorities and the facts in that particular case, the court held that the nature of the contract was such that a trial of the issue against the principal did not *estop* the surety. The court's opinion, however, was based upon the nature of the contract under consideration in that case. The court held that the defendants in that

case, including the surety, were co-obligors. The undertaking was an original undertaking on the part of all. They were all equally bound to performance. *"They are not mere guarantors."* The court further said: "Their liability is not merely consequential upon his failure to do so, but they are primarily liable for the debt." Upon the nature of the contract so declared, the Arkansas Court then used the language quoted by learned counsel for the petitioners. The court clearly pointed out the difference, showing that under a contract like the one in the case at bar, there was a mere suretyship or guaranty, and therefore under contracts like the one in the case at bar, *there is no obligation upon the surety until an obligation is fixed against the contractor.*

This point is settled in a recent Arkansas case.

English v. *Shelby,* 116 Ark. 212.

In that case the Arkansas Court said:

> "The liability of the sureties on the bond of a contractor under a contract to pave a city street is dependent upon the liability of their principal, the contractor."

In the case at bar the question is upon the bond of a contractor for making a city improvement. *In the English case just cited, it was the same.* Even if the Robinson case in the 13th Ark. should declare any contrary doctrine, this latter case would overrule the Robinson case, and the later case would control. *The English case is a construction of the very statute which controlled the giving of the bond in the case at bar.* It is therefore the construction of a state statute by a state Su-

preme Court. By that decision *the Supreme Court of Arkansas has said that there can be no liability against the surety until a liability is established against the contractor.* That was said of a street improvement bond.

In the case of *Kendrick* v. *Moss* (Tenn.), 58 S. W. Rep. 127, s. c. 104 Tenn. 376, quoting the syllabus from the Southwestern Reporter, the court said:

> "1. Defendant in an attachment proceeding in the Chancery Court, after the recovery of a judgment against him, moved for a reference as to damages for the attachment against both principals and sureties on the attachment bond. Previously he had commenced a suit at law in another county against the principals alone on the same cause of action, in which it was agreed by counsel that the bonds should not be withdrawn from the Chancery Court. Held, that defendant should be put to his election between the Chancery Court in one county and the law court in another, as both actions could not exist at the same time.
>
> "2. There cannot be two separate actions at the same time, one against the principals on the bond, and another against the sureties, since the obligations of the sureties must finally depend on the liability of the principals."

In the body of the opinion the Tennessee court used this language:

> "While the obligation of the principal and sureties is joint and several, still the liability of the sureties must in its final analysis depend upon the liability of the principals. It may occur as a result of separate actions that the principals may be adjudged not liable while the sureties may be so adjudged."

By reason of that possible result, the court reversed the decree of the lower court, and held that the liability of the surety was secondary and depended upon the liability being first established against the contractor. However, the rule may be elsewhere, the English case and the Arkansas statute heretofore referred to, established the doctrine in Arkansas. Therefore, the petitioners could not recover against the surety until after they had established a liability against the contractor. The following from petitioners' answer (referred to above, on another point) in *this* cause seems conclusive (12):

> "And in view of the obligations of the said sureties to see that said contract was carried out, the defendant (petitioners) is advised that they had the right to bring suit upon said bond for the collection of the damages which would be found by the Chancery Court of Miller County, Arkansas, in a settlement of all the issues and matters involved between the Burke Construction Company and this defendant (petitioners)."

That is a statement by petitioners of their own view that the suit in the Chancery Court will settle every controversy between petitioners and respondent. Hence, the making of M. C. Burke and J. A. Burke and the United States Fidelity & Guaranty Company a party defendant under the authorities herein relied upon, in no manner impairs the constitutional right of the respondent to bring and maintain a suit in the Federal Court. Neither can such action on the part of the petitioners destroy the jurisdiction of the Federal Court. Petitioners in their brief

on the petition for certiorari in this court and on pages 35 to 37 of that brief, and also in their present brief, page 46 and following, persistently contend that the obligation against the sureties is a several obligation. That argument in no manner destroys the surety or guaranty feature of that contract. *A contract may be several and at the same time also be a mere surety or guaranty contract.* It would be a strange rule of Federal law, therefore, that would permit the petitioners after the Federal Court had acquired jurisdiction of them, to bring a new suit in the State Court on the whole contract and join a mere surety or guarantor, which surety or guarantor may be made a party or left off, and by that act destroy the otherwise valid and binding and exclusive prior jurisdiction of the Federal Court. Petitioners' argument destroys itself. In their answer in this cause, they allege that suit No. 439 (12), still stands upon the docket of the Federal Court untried and undisputed of. They further allege that the sureties have not been made parties to that suit. Their contention that the surety contract is several, demonstrates that they have an absolute right to make the United States Fidelity & Guaranty Company a party defendant in *that* suit. Hence, they cannot deprive the Federal Court of its jurisdiction by that kind of evasion or inconclusive reasoning.

II.

Have the Federal Courts of the United States, having first acquired jurisdiction over the parties and the subject matter of a suit, the power and right under Sections 1 and 2 of Article III of the Constitution of the United States and the valid laws of Congress made in pursuance thereof, to use the writ of injunction, for the purpose of protecting and preserving that Federal jurisdiction until the object of the suit is accomplished and complete justice done between the parties?

The above question presents to this court the principal controversy. It is submitted with respect that learned counsel for the petitioners in their brief have not squarely met and argued that specific question. Said learned counsel seem to be confused by the doctrine of *abatement*. The question involved is not whether the State Chancery Court in case No. 692 will abate proceedings in that case because of existence of the *prior* suit No. 439 in a Federal Court. Neither is the question whether the Federal Court will abate the prosecution of suit No. 439 because of the existence of the *subsequent* suit No. 692 in the State Court. No such questions are involved. Counsel do not seem to realize that the facts presented call for a construction of Sections 1 and 2 of Article III of the Federal Constitution. Learned counsel from the very beginning seem to have misunderstood the real question in controversy. They did not distinguish between the cases involving the doctrine of *abatement* and cases which involve as does this one, the constitutional right of a citizen of one state to bring and maintain a suit in the Federal Court in another state.

Nature and Extent of National Judicial Power.

The judicial power of a Supreme Government is limited only by the language of the people creating the government, and dividing and defining the powers and duties of the different departments. That judicial power vested in the courts in our National Government, if it is to remain supreme, as it always has, within the sphere defined and imposed by the Constitution itself, must protect the Constitution and the power imposed by it; and hence the Federal Courts are in duty bound, acting with appropriate procedure, to prevent any conduct by a party litigant in the Federal Court from weakening, impairing, defeating or destroying the National Judicial Power. That judicial power being a creation of the Federal Constitution, must primarily be interpreted and applied by the Federal Courts.

Nashville v. *Cooper,* 6 Wall. 247.

When the people of this country adopted Section 2 of Article III of the Constitution reading: "The Judicial Power shall extend to all cases in law and equity * * * *to controversies,* * * * *between citizens of different states,*" they meant what their language clearly and plainly said. In the language of the preamble the purpose was to establish "Justice," and to promote the general welfare. The vice of local prejudice is a curse to any nation. The unjust influence and bias of the local community wrongfully intrude into the halls of justice. One of the great objects in establishing the Federal Courts was to have a tribunal free from this local prejudice.

Gordon v. *Longest,* 16 Pet., 97.
Goldey v. *Morning News,* 156 U. S. 523.

Within the Constitution and the valid acts of Congress, the national judicial power acknowledges no superior. Such judicial power is sweeping and embraces all controversies of a justifiable nature arising within the territorial limits of the nation.

Kansas v. *Colorado*, 206 U. S., 46.
Virginia v. *West Virginia*, 206 U. S., 317.
Chisolm v. *Georgia*, 2 Dall. 419.

This judicial power is vested in the Federal Courts by the Constitution and National valid laws.

Constitution of U. S., Sect. 1, Art. III.

Article VI says: "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land. * * *"

The Supreme force of this judicial power cannot be frustrated, impaired or defeated by the acts of any agency of the state, whether legislative, executive or judicial. Even a rule of this court cannot add to or take from the jurisdiction of the Federal Courts.

Meyer v. *Tuffer*, 1 Black., 522.

No state action can add to or take from the jurisdiction of the Federal Courts.

Terral v. *Burke Construction Co.* (Decided in February, 1922, this term).

It is equally certain that the Federal judicial power cannot be weakened, changed or destroyed by any state action or by the act or conduct of any citizen of any state. The unconquerable force of this judicial power imposes

upon both parties to any "controversy" the same obligations to obey its mandates. The same judicial power which grants to a non-resident a Federal right to sue a citizen in the Federal Court operates upon the citizen who is sued and compels him to yield to the exercise by another of that Federal right. The grant of a right to one to sue in the Federal Court equally imposes on the other the obligation or burden to yield to the exercise of that right. The existence of a right to sue in one, logically and constitutionally imposes upon the other the obligation to be sued. The obligation or burden of being sued is as much a creation of the Federal Constitution and valid national laws, as the right to sue. The right to sue cannot exist unless there exists an entity that may be sued. If the person to be sued can, by any act of his, such as bringing a suit in the State Court, defeat the Federal right to sue, then the latter, though created by the Federal Constitution, the Supreme law of the law, may be wholly annulled by the caprice or whim of a local citizen. There does not seem to be any escape from the reasoning that the creation in one of a right to sue, creates in the other the obligation to be sued. The exercise of the right to sue is at the election of the owner of that right, in becoming a citizen of a state, each individual by an irrevocable agreement bound himself to submit to the legal exercise of a right in the citizen of another state to sue said local citizen in the Federal Court. If it were not so the Federal right to sue could not exist. But the Federal right to sue does exist. Hence the Federal obligation to be sued also exists. Both

are creations of the same Federal Supreme law. That Federal obligation to be sued cannot be destroyed or thrown off by an evasive resort to a State Court. Beyond controversy a resort to a State Court by the defendant in the Federal Court, after the Federal Court has, by appropriate procedure, acquired jurisdiction of the parties, not only weakens and impairs the Federal Constitutional Judicial Power, but utterly destroys the same. Such a rule would give to such litigant a power not posesssed by either the national or state government. Such a rule would destroy the wholesome and invaluable provision in our national judicial system guarding against the evil of the wrongful influence of local prejudice, and would thereby in that respect amend our Constitution. If such rule should be adopted, the Federal Courts lose their jurisdiction of *"Controversies,"* between citizens of different states, *except by consent of the defendant.*

It has always been admitted that no writ, process, injunction or order of a state court, can interfere with causes in the Federal Courts.

Washington County v. *Durant*, 9 Wall. 415.
Weber v. *Lee County*, 6 Wall. 210.
Poweshiek County v. *Durant*, 154 U. S. 576.
U. S. ex rel Thomas v. *Keokuk*, 6 Wall. 518.

The State Court has no power to enjoin process of a Federal Court, issued to enforce its judgments.

U. S. ex rel Thomas v. *Keokuk*, 6 Wall., 518.
Central National Bank v. *Stevens*, 169 U. S. 432.

Notwithstanding these well settled principles, it is now proposed to modify the National Judicial Power, so as to permit a defendant in a Federal Court, after he has been properly sued in that court, to rush to a state court settle all controversies there, and thus make a farce of the Federal Court proceedings.

It is submitted that the reasoning of Judge Sanborn, speaking for the majority in the court below, stands unanswered by learned counsel for the petitioners. Said reasoning cannot be answered, if our Federal Constitution must remain as heretofore, the Supreme Law of the land. After stating the facts, Judge Sanborn with great force and clarity of reasoning, says:

> "The controversy which was the subject thereof was between citizens of different states. Of that controversy between these citizens of different states and of the parties to that suit, the court below acquired full jurisdiction by the filing of the complaint and the commencement of that suit by the Burke Company on March 19, 1920. By the Constitution of the United States (Article 3, Sec. 2) and the Acts of Congress (U. S. Comp. Stat. Sec. 991) the constitutional right was granted to the Burke Company to ask and to have a trial and adjudication of that controversy and the enforcement of that adjudication by the Federal Court. If the board, which subsequently, on March, 1920, brought its suit against the Burke Company and the sureties on its bond to secure an adjudication by that court of the same controversy between the same citizens, by a race of diligence lawfully may secure such an adjudication in the suit in the state court before in the orderly and proper course of proceeding in the suit in the Fed-

eral Court, the Burke Company is able to obtain such an adjudication and the enforcement thereof in the Federal Court, then the Federal Court's adjudication will be made futile, because before it has rendered it the controversy will have become *res adjudicata* by the adjudication of the State Court (*Boatmen's Bank* v. *Fritzlen* (8 C. C. A.) 135 Fed. 650, 667, 68 C. C. A. 288; *Insurance Co.* v. *Harris*, 97 U. S. 331, 336, 24 L. Ed. 959; *Barber Asphalt Paving Co.* v. *Morris*, (8 C. C. A.) 132 Fed. 945, 951, 66 C. C. A. 55, 67 L. R. A. 761), and the Burke Company will have been deprived of the right granted to it by the Constitution of the United States to the determination of its controversy with the board by the trial and adjudication thereof by the Federal Court, which first acquired jurisdiction of it and of the parties thereto.

"(2) A citizen who would exercise this constitutional right usually is compelled to bring his suit in the Federal Court in the state of the residence of the defendant in order to get service of process upon and jurisdiction of him. The reason for the grant to him by the Constitution, and in this case to the Burke Company, of this right to have the decision of its controversy with the citizen of another state by the Federal Court, was thereby to avoid the local attachments and prejudices in favor of the defendant that those who made the Constitution feared might injuriously affect the administration of justice in the State Courts against the claims of citizens of other states, and the question which this case presents is:

"When a citizen of one state, in the exercise of his constitutional right to an adjudication of a controversy he has with a citizen of another state, brings a personal action against the latter in the proper Federal Court in the state of the defendant's residence and citizenship, invokes and per-

sistently demands an adjudication of that controversy and the enforcement of that adjudication by that Federal Court, and that court first acquires full jurisdiction of the controversy and the parties to it, may the defendant, by subsequently commencing a suit in one of the courts of his state against the plaintiff in the first suit and others to secure an adjudication of the same controversy, and by pressing it to a judgment or decree before an adjudication can be obtained in the Federal Court, deprive the plaintiff of his constitutional right to an adjudication of the controversy and enforcement thereof by the Federal Court, oust that court of the jurisdiction first acquired by it and render the action in it futile, or may the Federal Court, which first acquires jurisdiction of the controversy and of the parties, lawfully protect and preserve its jurisdiction, its adjudication of the controversy, and the enforcement thereof by the use of its injunction against the defendants, who seek to deprive it of jurisdiction, their attorneys, representatives, and agents?

"The first impression which the presentation of the question presents to the mind is that it should be so answered as to preserve and enforce the right of the citizen to the trial and decision of his controversy by the Federal Court which the Constitution and the Acts of Congress granted to him. Counsel for the board, however, while they concede that, where courts have concurrent jurisdiction of the same parties and controversies, the court which first acquires jurisdiction of the *res* in a controversy holds it against courts in which subsequent suits are brought concerning that thing, contend that this case falls under the rule that actions in *personam* between the same parties concerning the same controversies may proceed at the same time in courts of concurrent jurisdiction, and the adjudication first obtained renders the controversy de-

cided *res adjudicata* as against a subsequent adjudication in the other court, and renders the suit therein futile.

"But the answer to this contention is that, in the case at bar, after the Burke Company had invoked the jurisdiction of the Federal Court and had thereby exercised its constitutional right to an adjudication of its controversy by that court, that Federal Court had exclusive jurisdiction to hear and decide the controversy, and the state court in which the subsequent action was brought had no concurrent jurisdiction thereof as long as the Burke Company insisted upon and demanded its constitutional right. In the investigation, study, and decision of this question the fact must be borne in mind that general statements, in text books and in opinions in cases in which the right of neither of the parties to the exclusive determination of the controversy involved by the Federal Court by virtue of Article 3, Sec. 2, of the Constitution was not claimed, demanded, thoughtfully considered, or adjudged, that actions in *personam* involving the same issues between the same parties may proceed at the same time in courts of concurrent jurisdiction, are neither authoritative nor persuasive on the question in this case, because in such cases it is probable that the claim of this constitutional right never came to the mind of or was determined by the writer."

Burke Construction Company v. *Kline*, 271 Fed. 605.

It seems to me that the precise question has been recently determined by this court.

Looney v. *Eastern Texas R. R. Co.*, 247 Fed. 214.

In principle that case cannot be distinguished from the case at bar. This court in the case of *H. E. & W.*

T. R. R. Co. v. *United States*, 234 U. S. 342, had sustained an order of the Interstate Commerce Commission as to rates in what is known as the "Shreveport case." There were further proceedings before the Interstate Commerce Commission thereafter, and on July 7, 1916, that Commission made another order. Immediately after that order was made, the Attorney General of Texas declared the order void. He further declared that he would institute suits under the Texas laws for damages and penalties against any carrier which should comply with that order of the Interstate Commerce Commission. The carriers then filed a bill in the United States District Court, averring the validity of the order and also the threats of the Attorney General to disregard it. The carriers prayed an injunction restraining the Attorney General from executing his threats. A temporary restraining order was issued and the tariffs were filed in accordance with the order of the Commission. Upon a hearing, the injunction was granted. The Attorney General then brought a suit in the State Court of Texas, praying an injunction restraining the carrier in effect from complying with the Commission's order. The Attorney General set a time for the hearing in the State (Texas) Court. Before the date for that hearing arrived, the carriers filed a supplemental bill in the Federal Court, and prayed the Federal Court to enjoin the Attorney General from proceeding in the State Court, either with the suit which he had already instituted or with any other suit of like character. In that case, as in the case at bar, the suit was brought to protect the

jurisdiction of the court, and in addition in this case it is brought to protect the constitutional right of the respondent to maintain a suit in the Federal Court. The court below granted an injunction, restraining the Attorney General, as prayed in the supplemental bill. The Attorney General brought the case to this court. The decree of the lower court was in effect affirmed. The court dismissed the appeal. This court, through Mr. Justice Clark, said:

> "The use of the writ of injunction by Federal Courts *first* acquiring jurisdiction over the *parties or* the *subject matter* of a suit for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is a familiar and long established practice."

In support of that, a number of cases are cited. It does seem that that decision is conclusive of the question here. In the instant case the Federal Court had secured jurisdiction of the parties. It had drawn to itself power over the controversy. That power had been constitutionally invoked by the respondent. The Federal Court did not have the power to abandon the suit, and thus destroy the valuable right of the respondent to maintain a suit in the Federal Court.

> "The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."
>
> *Chicot County* v. *Sherwood*, 148 U. S. 529.

In that case it is said that the principle embodied in the above quotation has been steadily adhered to by this court. It is not within the power of the State Legislature or of the state judiciary to add to or take from the jurisdiction and power of the Federal Courts.

Mississippi Mills v. *Cohn*, 150 Fed. 202.

A very recent case from this court on the same subject is *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175. That case was a bill to enjoin the enforcement of a judgment. The District Court granted the relief prayed for. The Circuit Court of Appeals reversed the District Court. This court reversed the Court of Appeals and affirmed the decree of the District Court. In that case, as in the case at bar, reliance was placed upon Section 265 of the Judicial Code. This court held that the Federal Courts had power to "enjoin the institution in the State Courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States or prevent them from maintaining and protecting their own jurisdiction by enjoining attempts to *frustrate, defeat or impair* it through proceedings in the State Courts." On the latter point this court cited the following cases:

French v. *May*, 22 Wall. 231.
Julian v. *Central Trust Co.*, 193 U. S. 93.
C. & O. R. R. Co. v. *McCabe*, 213 U. S. 207,
and also the Looney case above referred to.

In *Julian* v. *Central Trust Company*, cited above, this court said:

"In such cases we are of the opinion that a supplemental bill may be filed in the original suit, with a view to protecting the prior jurisdiction of the Federal Court and to render effectual, its decree."

In support of that, the following cases are cited:

Central Trust Co. v. *St. L. A. & T. R. R.*, 59 Fed. 385.

Fidelity Insurance T. & S. D. Co. v. *N. & W. R. R. Co.*, 88 Fed. 815.

State Trust Co. v. *K. C. P. & G. R. R. Co.*, 110 Fed. 10.

In addition, this court, speaking through Mr. Justice Day (193 U. S. 93), used the following language:

"In such cases where the Federal Court acts in aid of its own jurisdiction, and to render its decree effectual, it may, notwithstanding Section 720 Revised Statutes, restrain all proceedings in a State Court which would have the effect of defeating or impairing its jurisdiction."

In that case this court cited with approval the case of *Sharon* v. *Terry*, 36 Fed. 337, a case cited by Judge Sanborn in the majority opinion in the court below and which is squarely in point here. That opinion was by Mr. Justice Field of this court. The doctrine of that case has therefore been approved by this court.

The case of *Knott* v. *C. B. & Q. R. R. Co.*, 230 U. S. 474, is also in point. In that case the railroad companies brought suits in Federal Courts to enjoin certain statutory rates of the state. After these suits

were commenced in the Federal Court, the Legislature of Missouri, and while the suits were pending, passed additional laws slightly increasing the rates which were involved. After the passage of the new laws the carriers moved for leave to file in the Federal Court supplemental bills. Before a hearing could be had on that motion, the suits were brought in the State Court in the name of the state against the Railway Companies, seeking an injunction compelling the carriers to put the new rates into effect. After that state litigation had been commenced, the carriers amended their supplemental bills, so as to set up these facts, and asked for injunctive relief. *It was contended by the State that the litigation in the State Courts was prior in time, and that the plaintiff in the State Court had the right to proceed in that court.* The State resisted the injunction in the Federal Court, on the ground that the plaintiff in the causes in the State Court had an absolute right to proceed in the State Court, and contended that the suits growing out of the new legislation were actually brought first in the State Court. The party in the State Court, therefore, in that case was in a better position than the petitioners in the case at bar. This court denied the contention of the State, and in an opinion by Mr. Justice Hughes, said:

> "The additional legislation pending the suits, and the substitution of slightly higher rates on certain commodities embraced in the earlier act, did not alter the essential features of the controversy. There was identity of parties and subject-matter, although nominally different acts were involved. To have required original bills would have involved

double litigation, double costs, and great delay. The ends of justice were advanced by allowing the amended and supplemental bills, and we are not inclined to interfere with the reasonable discretion of the trial judge in a matter of practice which in no way violated any of the substantial rights of the appellants.

"Neither can it be said that the state court had prior jurisdiction. That the state filed in one of its courts bills for the enforcement of the Act of 1907, before the actual filing of the supplemental bills, may be true; but the application for leave to file the supplemental bills was pending in the Circuit Court of the United States, and action was suspended, merely to give opportunity for hearing, the court meanwhile restraining the enforcement of the new rates. In view of the pending bills assailing the Act of 1905, the substantial identity of the question arising under the Acts of 1907, and the pendency of the motion for leave to file supplemental bills, we are clearly of opinion that priority of jurisdiction belonged to the United States, and the state court could not properly oust that jurisdiction."

That decision of this court is a splendid illustration of the sound rule that courts look at substance rather than form. The petitioners in the case at bar, through technicality and by making M. C. Burke and J. A. Burke parties to the suit in the Chancery Court, and by refusing to make the United States Fidelity & Guaranty Company a party defendant to their cross-complaint in suit No. 439, are endeavoring to evade the plainest principles of justice and right and sound constitutional law. They should not be permitted to do indirectly what they are forbidden absolutely to do directly.

In addition to those cases, this court also cited the case of *Dietzsch* v. *Huidekoper,* 103 U. S. 494. That case is precisely in point in the case at bar. An ancillary injunction suit was brought in that case to enjoin the proceedings in the State Court. It makes no difference in the application of the principles that the injunction is brought before adjudication instead of after. If the injunction cannot be issued, then the Federal Court is without or may be deprived of, jurisdiction, notwithstanding the Constitution of the United States and the Acts of Congress passed under it.

In the final analysis, if there can be no injunction in the Federal Court, enjoining the procedure in the State Court to protect the Federal right of the plaintiff, and to preserve and protect the jurisdiction of the Federal Court, then one of two results must follow: 1. The fleetest court will settle every controversy growing out of the contract; and its action or decree will be a bar to any further proceeding in the other court, or 2. Each court, regardless of what is done in the other, will pursue the case to the end and follow the final decree with executions or receiverships to collect the judgment. It is apparent from this record, that petitioners believe that they will lose in the Federal Court, and win in the State Court. Such may easily be the result in each case. Hence, in the final end, there would be an execution or a receivership in the Federal Court to collect a judgment for the respondent and the same or similar process or proceedings in the State Court to collect a decree for a money judgment in favor of the petitioners. In addition, if the

majority of the court below is wrong, and if the second contingency above is not to be accepted, then the jurisdiction of our Federal Courts in our great national judicial system, depends entirely upon the speed with which justice may be administered in the concurrent or rival State and Federal Courts. The court with the swiftest motive power will be the one acquiring and retaining jurisdiction. Hence the court that can hold a continuous session running through night and day will be the controlling court. One other consideration in the matter of conflict should not be overlooked. If each court is limitless in power and uncontrollable in its procedure, each may set the case in its court for the same hour of the same day, as in the other court. Hence, each may, by attachment, contempt proceedings and otherwise, bring into its court room at the same time, as in the other court, the parties and witnesses in the two causes, thus compelling each litigant and witness to be in two separate court rooms widely separated from each other, at one and the same time. To avoid friction and in order to make it impossible for the parties to make faces at each other, one side could appear in the State Court, and the other in the Federal Court, thus enabling each case to run more smoothly to its final decree.

If result 1 above is the consequence, then the Federal Court has an auxiliary or subordinate function only, and must simply record the judgment and opinion of the State Court. In other words, the Federal Court exercises no independent judgment in the matter at all, but under compulsion of circumstances, including rapidity of pro-

cedure such as trying a case 90 days before it should be tried under state law, accepts the opinion and decree of the State Court. But in the case of *Mankato* v. *Barber Asphalt Paving Co.* (8th Cir.), 142 Fed. 340, in discussing the lack of the controlling force of the State Court, the Federal Court said: "As to such questions, it is not only the privilege but the duty of this (Federal) Court, which it owes to suitors entitled to invoke its jurisdiction, to exercise its independent judgment."

It is submitted that precisely the same question came before this court in *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U. S. 258. In principle that case cannot be grounded upon any possession of property. It was a property right that was involved. Miller & Lux brought a suit in the United States Court on Jun. 10, 1902. The object of the suit was to determine certain water rights existing in part in California and in part in Nevada. On October 15, 1904, the defendant in the Federal Court brought a suit in the State Court of California, for the purpose in effect of determining the same rights. Miller & Lux thereafter filed an ancillary bill for an injunction in the Federal Court in Nevada, seeking to enjoin Rickey and others, plaintiffs in the California suits, from the prosecution of their actions in the State Court of California. The court below granted the relief. See 146 Fed. 574 and 152 Fed. 11. *This court affirmed the decree, thereby enjoining Rickey from prosecuting his suits in the State Court of California.* In affirming the case, this court, speaking through Mr. Justice Holmes, said: "We are of opinion, therefore, that there was con-

current jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seized should proceed to the determination without interfering on the principle now well settled as between the courts of the United States and of the states. In that case this court cited *Prout* v. *Starr*, 188 U. S. 537. In principle the latter case is also exactly like the case at bar. This court, speaking through Mr. Justice Shiras, said:

> "The object of the supplemental bill was to restrain the present appellant, as successor of Smyth, from attempting to transfer the very materials that stood for judgment in the Federal Court to the State Court by filing a bill in the latter."

If the petitioners in the instant case could, over the objection of the respondent, successfully prosecute Suit No. 692, then it would be established that a citizen of the state may *remove* a case from the Federal Court to the State Court without complying with the Federal Law on the subject. Such a result cannot be legally admitted or contemplated.

In the same case last cited, this court also said:

> "The jurisdiction of the Circuit Court could not be *defeated* or *impaired* by the institution by one of the parties of *subsequent* proceedings, whether civil or criminal, involving the same legal questions, *in the state court.*"

If under these circumstances, the petitioners could be permitted to bring and maintain suit No. 692 in the State Court, then it would necessarily follow that the said petitioners could bring the same suit and with the same

consequences, *even though the respondent had removed the controversy between the parties to the United States Court.* In other words, suppose the petitioners, which they had a right to do, had brought their suit against the respondent in the State Court, having brought said suit against the respondent only. The respondent appears and removes the case to the United States District Court. The petitioners then bring another suit in the State Court, naming the sureties on the bond as parties, and proceed with that suit to the utter defeat and annihilation of all jurisdiction and authority of the Federal Court. It is well settled that such a proceeding cannot be upheld. This court in effect so declared in the case of *Gordon* v. *Longest*, 16 Peters, 97. Quoting from the syllabus, this court in that case said:

> "One great object in the establishment of the courts of the United States, and regulating their jurisdiction was to have a tribunal in each state presumed to be free from local influence, and to which all who are non-residents or aliens might resort for legal redress, and this object would be defeated, if a state judge in the exercise of his discretion, might deny to the party entitled to it a removal of the cause."

It is respectfully submitted that the following cases also support the doctrine contended for:

C. & O. R. R. Co. v. *McCabe*, 213 U. S. 207.
Smith v. *Ames*, 169 U. S. 466.
Root v. *Woolworth*, 150 U. S. 401.
See 5 Fed. Stat. Ann., 959 and cases cited on page 964.
Stewart v. *Wis. R. R. Co.*, 117 Fed. 782.

Louisiana R. R. Commission v. *Texas etc. R. R.*, 144 Fed. 68.

Jackson v. *Parkersburg etc. Electric Ry. Co.*, 233 Fed. 784.

K. C. Gas Co. v. *K. C.*, 198 Fed. 500.

St. L. Mining Co. v. *Montana Mining Co.*, 148 Fed. 450.

Knott v. *Evening Post*, 124 Fed. 342.

Starr v. *C. R. I. & P. R. R. Co.*, 110 Fed. 3.

That is the same case as *Krout* v. *Starr*, 188 U. S. 537.

Harkrader v. *Wadley*, 172 U. S. 148, 164, 19 Sup. Ct. 119, 43 L. Ed. 399.

Wallace v. *McConnell*, 13 Pet. 135, 10 L. Ed. 95.

Clerk v. *Five Hundred and Five Thousand Feet of Lumber*, 65 Fed. 236.

Crittenden v. *Brewster*, 2 Wall. 191.

Orton v. *Smith*, 18 How. 263, 265.

Freeman v. *Howe*, 24 How. 450.

Peck v. *Jenness*, 7 How. 612, 622, 625.

Wiswall v. *Sampson*, 14 How. 52.

Guardian Trust Co. v. *K. C. S.*, 171 Fed. 43.

15 Corp. Jur. Subject Courts, Sect. 583, pps. 1134, 1139 and cases there cited.

United States v. *Peters*, 5 Cranch, 115.

Since the dissenting opinion of Judge Lewis in the court below and petitioners rely in part upon the same cases, the indulgence of this court is asked, so as to permit a further review of said cases, in order to show that none of them is in point.

These cases, it is submitted with great respect, relate to questions of abatement and similar questions, and not to the question here involved.

Sections 1 and 2 of Article III of the Constitution of the United States and the Acts of Congress passed in pursuance thereto, give citizens of one state the right to bring and maintain a suit in the Federal Court in another state. The Constitution of the United States and sound reason led the court below to the conclusion that the Federal Courts have power by injunctive relief, to prevent parties *in those courts* and over whom those courts have prior jurisdiction from defeating the jurisdiction of said Federal Courts by bringing suits in the State Courts, and that said Federal Courts have the power to protect their own jurisdiction by enjoining attempts to frustrate, defeat or impair said jurisdiction through proceedings in the State Court by the very parties who are litigating in the Federal Court.

Petitioners rely upon *Covell* v. *Heyman*, 111 U. S. 176. A study of that case shows that it is an authority in favor of the contention of the respondent. Heyman brought suit against Covell, a Deputy United States Marshal, for the recovery of specific personal property or its value. The Deputy Marshal had seized the property upon an execution issued out of the United States Court. The Supreme Court of Michigan permitted a recovery against the Deputy Marshal. This court reversed the Michigan Court, holding that in cases of conflict between the courts, the question did not depend upon the rights of the parties to the property seized, *but upon the question as to which jurisdiction had first attached.* The underlying principle of the case is *one of priority of jurisdiction.* Prior jurisdiction of the person is the controlling reason.

That is true whether the case is one of seizure of property, or whether it is a case seeking a judgment in personam. In that case the court cited *Taylor* v. *Carryl*, 20 How. 583. In the latter case this court said:

> "When a court has jurisdiction, it has a right to decide every question which occurs in the cause and when the jurisdiction of the court and the right of the plaintiff to prosecute his suit has once attached, *that right cannot be arrested* or *taken away by proceedings in another suit.*"

That principle is applicable regardless of whether the suit is *in personam* or includes possession of property. In the case at bar the Federal Court in Suit No. 439, by proper process had jurisdiction of the petitioners. The petitioners acceded to that jurisdiction *by filing a cross-complaint* and an answer demanding the same relief which they demanded in the State Chancery Court. Hence, under Sections 1 and 2 of Article III of the Constitution of the United States, and the cases heretofore and hereafter cited, it does not lie within the power of the petitioners to make a farce of the trial of suit No. 439. In a conflict between state and national powers, the one which is supreme must yield to that which is not supreme.

Gibbons v. *Oyden*, 9 Wheat 1.
C. R. I. & P. R. Co. v. *Hardwick F. Oil Co.*, 226 U. S. 426.
Simpson v. *Shepard*, 230 U. S. 352.
Southern R. Co. v. *Reid*, 222 U. S. 424.

The doctrine of the case of *Taylor* v. *Carryl*, was based upon the prior case of *Peck* v. *Jenness*, 7 How., 612. Therefore, this court, as early as 1857, held that

when a Federal Court had rightful jurisdiction of the *parties,* the right of the plaintiff to pursue his remedy in the Federal Court could not be *arrested, impaired* or *taken away* by proceedings in another court. It is not a question of the *plaintiff* bringing a suit in several different courts. It is a question of the right of a citizen of another state to adjudicate his controversy in the Federal Court under the Constitution and Laws of the United States. Therefore, when the Burke Construction Company, a non-resident of Arkansas, lawfully brought its suit in the United States District Court against the petitioners, citizens of Arkansas, the said citizens of Arkansas have no legal right or power thereafter, to institute a suit on the same contract involving the same issues, the direct result of which will be to destroy the respondent's right in the Federal Court, by bringing a suit in the State Court. Such suit in the State Court, involving the same issues and determining the same question, will necessarily deprive the Federal Court of its jurisdiction. The petitioners boldly assert in these proceedings their right to deprive the Federal Court of its jurisdiction. They admit in their answer (11) that in suit No. 439, the petitioners and the respondent are the sole parties. They admit that they set up in the counterclaim in No. 439 every relief to which they are entitled in No. 692, except they claim relief against the Surety on the bond. As they cannot secure a judgment against the surety on the bond until they have first shown a default in the contractor, that assertion does not change the issue. In other words, as heretofore urged the making of the surety on the bond

a party defendant in the case in the state court cannot be used to deny the respondent a Federal right under the Constitution of the United States, to bring and maintain its suit in the Federal Court. The asserted right of the petitioners to make the surety on the bond a party in the State Court is necessarily in conflict with the right of the respondent to maintain its suit in the Federal Court. The right to sue the surety is a dependent and secondary right, but that possible and contingent right, cannot because its nature became superior to respondent's prior Federal right. This contingent right may never come into being because this court may find that petitioners broke their contract. But petitioners are voluntarily waiving an opportunity to assert their contingent right in suit 439 now. Placing upon the question the most favorable construction for the petitioners, they are therefore in possession of a contingent right which conflicts with a Federal right, guaranteed to the respondent by the Constitution of the United States. In all such cases, upon the authorities heretofore and hereafter cited, the state right must yield to the supreme Federal right. This inferior right of the petitioners, they boldly assert that they intend to press *regardless of the effect of their action, upon the Federal right of the respondent.* In their answer in this cause (14) they say: *"It is true that the defendants (petitioners) intend to proceed with the trial of said cause* (692) *pending in the said Miller County Chancery Court, as they have the right to do, as they verily believe."* Other similar expressions throughout the answer in this

cause make it perfectly clear that the petitioners assert the superiority of their inferior right, although they admit that their suit was brought subsequently to the bringing of the suit in the Federal Court, and although they admit and allege (12) that their suit 692 for *damages*, in Chancery, when tried will necessarily result "IN A SETTLEMENT OF ALL THE ISSUES AND MATTERS INVOLVED BETWEEN THE BURKE CONSTRUCTION COMPANY AND THIS DEFENDANT" (Petitioners). (See page 12 of Record).

In *Covell* v. *Heyman, supra*, recognizing in effect the superiority of Federal rights, this court said: "We need scarcely remark that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdicton of its judicial tribunals were subject to the determination of another." Therefore, Sections 1 and 2 of Article III of the Constitution of the United States and the Acts of Congress made in pursuance thereof, including the Judiciary Act of 1911, make it impossible that a party defendant in a Federal Court may go into a State Court and render the proceedings in the Federal Court futile, thus denying to the non-resident of that state a right given by Federal Law.

Learned counsel in their brief admit that the Federal Courts have ultimate and final authority in such matters. See page 20 of their brief. If petitioners are permitted to proceed in suit No. 692, necessarily there arises a conflict. This conflict is brought about by the improvident action of the petitioners, themselves in attempting to transfer or remove the cause to the State Court. In order

to see that the effect of a trial in the Sate Court in a subsequent suit would be to deprive the Federal Court of its jurisdiction, it is only necessary in a brief way, to examine the undisputed evidence.

In the answer and counterclaim of petitioners in No. 439, and in the complaint in No. 692, substantially the same relief is prayed for. It is also shown in these pleadings of the petitioners that they regard the surety bond as a surety or guaranty bond only. The conduct of petitioners as set forth in these pleadings of the petitioners shows that such is their understanding of said surety bond. They do not seek any judgment against the surety, independently of a suit against the contractor. Their whole conduct shows that they regard a judgment against the contractor as necesary and essential before a judgment can be obtained against the surety. It is impossible to understand the failure of the petitioners to make the United States Fidelity & Guaranty Company a party defendant to their cross-complaint in suit No. 439. If the petitioners actually wanted a trial, and if they actually wanted a final adjudication of all the issues, and that speedily as they have above asserted, they certainly would have brought the United States Fidelity & Guaranty Company, a corporation of Maryland, into their cross-complaint as a party defendant thereto, in the Federal Court. They had that absolute right, and if they were sincere in their efforts to get a judgment against the surety, they certainly had the opportunity so to do. Everyone knows that the real surety was the United States Fidelity & Guaranty Company. M. C. Burke and J. A. Burke were

merely nominal sureties. The right to recover in No. 439 on the cross complaint depended upon the contract. It depended upon the question as to who broke the contract first. Precisely the same is true of the pleadings in No. 692. In the application to the Circuit Court of Appeals (149) it is alleged by the respondent "that in the hearing on the application of this plaintiff for a temporary injunction, which was had as above stated, counsel for the defendants admitted in open court that the trial of the case in the Chancery Court of the state would settle every issue involved in the suit No. 439 law, above referred to. In the same paper (150) it is alleged: "The defendants admit that unless restrained they will resort to a final determination of said issues in the said State Chancery Court, and admit that said issues are exactly the same as said issues in the United States District Court."

I do not find any denial of those allegations, except the claim that the sureties are made parties in No. 692. The conduct and pleadings of the petitioners throughout show conclusively that it is their purpose to end the jurisdiction of the Federal Court by first securing an adjudication of all controversies in the State Chancery Court. Hence, the admitted effect of a trial in the State Chancery Court is that such trial will settle every controversy between petitioners and respondent and leave the Federal Court absolutely without any issue and without any parties, and hence would leave all of its orders ineffective, and would take away all its jurisdiction of the entire subject matter, as well as its jurisdiction of the

parties. Under the Federal Constitution above referred to that cannot be done.

Reliance is placed upon *Mutual Life Ins. Co.* v. *Harris*, 96 Ark. 588. The questions there presented are not the questions presented here. The suit was brought first in the State Court in New York. Thereafter, a suit was brought in the Federal Court in Maryland. In the latter court, an injunction was sought, enjoining the further prosecution of the causes in the State Court of New York. For the plaintiff to bring a suit in the State Court in New York, and then afterwards bring a suit on the same cause of action in the Federal Court in Maryland does not deny to either party a Federal right.

Petitioners and the minority opinion also rely upon *Stanton* v. *Emery*, 93 U. S. 548. That case is wholly different from the present one. The case was very similar to the Harris case. Plaintiff brought a suit in the District of Columbia, and later brought a suit in the State Court. In such cases neither court will enjoin the plaintiff from prosecuting a suit in the other court.

The case of *Gordon* v. *Gilfoil*, 99 U. S. 168, is also relied upon. The question here involved was not presented or considered by this court in that case. In that case it was a question of abatement, and abatement only. The Doctrine of abatement has no application in the case at bar. The respondent, which is the plaintiff in case No. 439, has not asked the court to postpone the trial of that case, because of the pendency of a suit involving the same issues in the State Court. Even the petitioners in their answer (10) in said case No. 439, did not ask the court

to abate the trial of that case because of the pendency of the suit in the State Court. The defendant in said answer, admits that said suit No. 439 had been filed, and does not deny that said suit was filed on the 16th day of February, 1920, and that its own suit was not filed until March 19, 1920. In the counterclaim in that suit (84) are found substantially the same allegations that are found in the bill of complaint in the State Chancery Court. See pages 84 and 106. In petitioner's bill of complaint (106) it is admitted by the petitioners, that the respondent has brought suit in the United States Court, and that said suit was brought prior to the suit in the State Chancery Court. The petitioners, however, did not in their answer and counterclaim, or cross-complaint in suit 439, nor in their original bill of complaint in the State Chancery Court (106) ask or pray or demand that the suit in the Federal Court be abated. Neither did the petitioners in their cross-complaint in the Federal Court, set up and claim that the suit in that court should be abated, because of the pendency of the suit in the State Chancery Court. It is therefore established by the petitioners' own pleadings beyond controversy, that no right of abatement is claimed by the petitioners in either court. Hence, all cases similar to *Gordon* v. *Gilfoil*, 99 U. S. 168, have no application.

The case of *Buck* v. *Colbath*, 70 U. S. 334, is without bearing on the instant case, for that and other reasons. The only question involved in that case was the liability of a United States Marshal for a wrongful and illegal levy, a levy made without authority upon property which did

not belong to the defendant in execution. The acts of the Marshal were held to be illegal and void. In that case this court recognized the right of the party wronged by the void action of the Marshal to bring the suit in a State Court. That case contains nothing new, and contains nothing supporting the contentions of the petitioners. This court in that case, however, recognized two principles of law, which are helpful to the respondent. In effect, this court held in that case that when one court had first taken jurisdiction of the persons to the litigation or the subject matter of the action, no other court could interfere, unless it has a supervisory control over the court whose process has first taken possession. It is true that that remark applied to the question of possession of property by the authorities heretofore and hereafter cited.

Under facts like those in the case at bar, the principle has equal application, precluding another court from depriving the Federal Court of Jurisdiction, when the latter has first legally taken jurisdiction over the persons or the subject matter of the action.

In another important respect that case has a bearing upon the instant case. In the opinion it is said:

> "It is true that if under the intimations in *Freeman* v. *Howe*, (24 How. 450) the claimant of the property had voluntarily gone before that court and asked by petition that the property be released from the attachment and restored to his possession, he might have raised such issue, and would have been bound by its decision."

In the case at bar the petitioners did go into the Federal Court with their counterclaim, and ask for the same relief against the respondent that they demanded in their bill of complaint in the State Chancery Court. Before they can possibly recover from the United States Fidelity & Guaranty Company, the surety on the bond, they must first establish a breach of the contract by the respondent, and damages resulting to the petitioners by such breach of such contract. See their brief, page 23.

Petitioners also rely upon the case of *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322. In that case Hunt brought his suit in the Chancery Court of Shelby County, State of Tennessee against the Western Union Telegraph Company, enjoining that company from ceasing to furnish to Hunt certain telegraphic information. The rights of the telegraph company were entirely different from the rights of the New York Cotton Exchange. There was no privity between the rights of said New York Cotton Exchange and the Western Union Telegraph Company. The Cotton Exchange was not made a party in the State Court, and no relief was sought against it. The Cotton Exchange had a property right in the news sought to be obtained, but the Western Union Telegraph Company did not have such property right. Later, and after a decree had been rendered in the State Chancery Court against the Western Union Telegraph Company, the New York Cotton Exchange brought suit in the United States District Court for the Western District of Tennessee against Hunt, seeking to enjoin Hunt from converting the property of the New

York Cotton Exchange to the use of said Hunt without compensation. Before the trial of the case in the Federal Court, the suit in the State Court had been appealed to the Supreme Court of Tennessee and reversed. Hence, there did not exist at the time of the trial in the Federal Court any final adjudication in the State Court. The two suits, one of *Hunt* v. *Western Union Telegraph Company*, and the other of the *New York Cotton Exchange* v. *Hunt*, were brought for different purposes, and based upon a different state of facts, and involved different property rights. They were not based upon precisely the same contract as in the case at bar. The issues between the parties did not depend upon the same facts, nor were the persons parties to a contract on which both suits were based. It is respectfully submitted that the Hunt case insofar as it has any application to the instant case, supports fully the contention of the respondent. Hunt insisted that the injunctive relief prayed for by the New York Cotton Exchange amended an injunction against proceedings in the Chancery State Court of Tennessee. He insisted that such an injunction, therefore, could not be issued, because it was prohibited by Section 720 of the United States Compiled Statutes of 1901. See 5 Fed. Stat. Ann. p. 959, and cases cited thereunder.

Hunt insisted that no injunction could issue against him, because the effect of it would be to destroy his injunction decree in the State Court. In other words, he contended that the injunction against him in the Federal Court prohibited him from receiving the information

which the Western Union Telegraph Company was compelled under the decision of the State Chancery Court to furnish him. This court in the Hunt case denied that contention, and distinguished the authorities upon which Hunt relied. This court denied the contention of Hunt, deciding that the purposes of the two suits were different. The question here involved was not raised by either party, nor was it discussed.

The petitioners also rely upon the case of *St. L. I. M. & S. R. R.* v. *McKnight et al.*, 244 U. S. 368. That case furnishes no aid to the petitioners. The Railway Company on May 11, 1911, secured a final decree against the Railroad Commission, and shippers and travelers, enjoining said defendants from enforcing the lower rates put in effect by the Railroad Commission. In the same decree the injunction bond and the sureties thereon were released. That decree was reversed by this court, in *Allen* v. *St. L. I. M. & S. Ry. Co.*, 230 U. S. 553, and the mandate from this court was filed in the lower court on July 18, 1913. After the mandate was filed, the District Court proceeded to carry out the decree of dismissal directed by this court. In that decree, however, the court on its own motion, referred to a master the matter of damages alleged to have been sustained by the defendants in the original suit. The complainants, Gallup & Metcalf, did not appear before the Master. Said complainants were never served with process in the Federal Court. They never appeared in the Federal Court to assert their claims. Gallup brought suit in the State Court, to recover from the Railway Company under the

State Statute, the overcharges accruing to him after May 11, 1911. He also included in his claim, sums accruing to him during the existence of the injunction. The Railway Company then filed a supplemental bill in the Federal Court, seeking to enjoin Gallup and Metcalf from the prosecution of their claims in the State Court. From the statement of the case by this court it is therefore perfectly clear that Gallup and Matcalf the complainants, were not in effect attempting to sue on a cause of action involved in the Federal Court. They were not bringing a suit on the same contract on which a prior suit has been instituted in the Federal Court. In the first place this court doubted the right of the Federal District Court to order a reference of the claims to the Master. This court, however, said that it was not necessary to express an opinion on that point. It is said that even if the power existed "it could extend only to such shippers and travelers as elected to file their claims with the Master." It is therefore clear that Gallup and Metcalf had never submitted themselves to the jurisdiction of the Federal Court.

In the case at bar, the petitioners were sued in the Federal Court, and were served with process. They moved to strike out and to paragraph and to make more definite and certain. They demurred, and they answered and they filed a counterclaim in a "cross-complaint." Hence, they sued on the same contract, and alleged damages by reason of the breach of that contract, appearing in the Federal Court, and having the issue as to which party had broken the contract submitted to a

jury, and claiming damages by reason of the breach of the contract, as stated by the respondent. Returning to the McKnight case this court noticed the fact that the overcharges accruing after May 11, 1911, were not recoverable on the injunction bond. In addition, this court said that the injunction from the Federal Court would not lie to prevent the recovery in a State Court for overcharges made after the final decree in the Federal Court. In addition this court said that Gallup made no claim under the injunction bond:

> "He sues on causes of action to recover overcharges arising under the Arkansas Statutes. His right to sue suspended by the injunction improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill. Although the injunctions enjoined all shippers and travelers, and therefore him, from instituting suits on account of the alleged overcharges Gallup did not in fact, become a party to the suit in the District Court; and he could not after the mandate directed dismissal of the bill, be compelled to submit to that court the adjudication of his claim."

Hence, there is a wide difference between that suit and the instant case, Gallup and Metcalf had never gone into the Federal Court and asked relief. They were not suing upon the same contract. In fact, there was no suit on any contract at all. There was not involved in that case a single issue as to who broke the contract, and the damages that may accrue to the injured party by reason of the breaking of a single contract. If the petitioners broke the contract, necessarily as a matter of law, there can be no liability against the surety. If the

respondent broke the contract, there would be, if the facts warranted it, a liability against the respondent, and if that liability was undischarged by the respondent, the surety would then be liable.

The case of *W. E. Stuart Land Co.* v. *Arthur*, 267 Fed. 184, has no application, because in that case both suits were brought by the *plaintiff*.

The *plaintiff* brought a suit in the United States Court in the State of Iowa. The same *plaintiff* then brought a suit for the same cause of action in a State Court of Oklahoma. The suit was based upon two checks and a promissory note. In the Oklahoma State Court, plaintiff caused property of the defendant to be seized, and had a receiver appointed. Plaintiff then began to take testimony in the Oklahoma suit. The defendant, Arthur, then went into the District Court in Iowa, and sought to have that court enjoin the plaintiff from taking depositions for use in the court in the State of Oklahoma. There was not involved a Federal right of a non-resident to bring and maintain a suit in a Federal Court, and to enjoin the defendant in the Federal Court from defeating the jurisdiction of the Federal Court by a later suit brought in the State Court. In every case, in considering the same as an authority, the facts always must be considered. The Land Company had evidently discovered property of Arthur in the State of Oklahoma, which could be attached to secure the payment of any judgment that the Land Company might obtain against Arthur. It is a matter of common knowledge that

creditors of absconding debtors may bring numerous suits in different jurisdictions for the purpose of seizing property to satisfy the creditor's claim. Arthur had not brought a suit in the Federal Court in Iowa against the Land Company. If there had been a contract between the Land Company and Arthur, and if there had been a question as to whether the contract had been broken, and if so which party to the contract broke it, and if Arthur had brought suit on the contract in the Federal Court in Iowa, and if the Land Company had appeared in that suit, answered, filing a counterclaim in a cross complaint, asking judgment against Arthur, and if thereafter the Land Company had gone into a State Court, either in Oklahoma or Iowa, an entirely different question would have arisen. Arthur would then have been in a position to say that the effect of the action of the Land Company was to deprive him of a right to sue in the Federal Court. If a Federal question had been involved in the contract, Arthur might have sued in the State of Iowa, even though he had been a citizen of that state. If Arthur was a citizen of some state other than Iowa, and had brought his suit under the circumstances above shown, he could then have claimed the same right that the Burke Construction Company is now claiming here. The right of a *plaintiff* to bring a number of suits on the same cause of action in different courts and the right of the *plaintiff* to pursue any one of those suits, is a different thing from the right of the defendant in a suit in a Federal Court after that court has acquired prior jurisdiction to bring a suit on the same cause of action in the State Court, the

necessary result of which is to deprive the Federal Court of its jurisdiction to hear and determine the cause there pending.

Under that state of facts, if the State Court has proceeded to an adjudication of all the rights of all the parties under the contract, then the Federal Court when the cause is reached for trial there, has nothing to adjudicate. The result is that the defendant, under those circumstances, has *removed* the case from the Federal Court to the State Court without authority of law and has deprived the non-resident of a right to maintain his suit in the Federal Court and has rendered all action in the Federal Court futile. The real question involved is not one growing out of the concurrent jurisdiction of different courts in suits in *personam*. The question is the right of a defendant, a citizen of a state, after being sued in the Federal Court by a non-resident, to go into the State Court, and bring another suit on the same contract, and rush that to a trial and adjudicate all rights based upon that contract, and thus defeat the jurisdiction of the Federal Court.

Petitioners and Judge Lewis also rely upon *Merritt v. Steel Barge Co.*, 79 Fed. 228.

That case does not discuss or decide the question here involved, although at first blush it seems similar. When analyzed it will be found that the question here under consideration was not raised or discussed or decided in that cause. In that case the Merritts brought suit in a State Court in Minnesota. The defendant, the

American Steel Barge Co., was a non-resident of Minnesota. The Barge Company being a corporation of New Jersey, removed that case to the Federal Court in Minnesota. After the removal, certain issues were made up in the Federal Court. In that answer the Barge Company alleged that the Merritts had brought a suit to enjoin the sale of the shares of stock in controversy, which suit was brought by the Merritts in the State Court in New York, on April 10, 1894. That injunction suit was dismissed. Then in May, 1894, and the exact date is not given in the report of the case, but after the suit was filed in Minnesota, the Barge Company brought suit in the Supreme Court of the City of New York against the Merritts. The suit of the Merritts in Minnesota was brought to recover the value of shares of stock in the Lake Superior Consolidated Iron Mines. The suit of the Barge Company was for the purpose of determining the rights of the parties in and to the five promissory notes mentioned in the complaint of the Merritts, and too, for the shares of stock for the value of which the Merritts had brought suit in Minnesota. The Barge Company in the State Court in New York, prayed that the interest of the Merritts in the stock be adjudged inferior to the claim of the Barge Company on said stock. It was alleged in the suit of Barge Company, brought in New York, that the shares of stock were physically in New York, and were subject to the jurisdiction of the court, where said suit was brought in that city. It was further alleged that the Barge Company had a lien and that the New York Court had the power to enforce that lien. It

does not appear that the Merritts took any steps in the case pending in New York, to protect their rights in the cause pending in the Minnesota Court. It was alleged in the suit in New York that the Merritts had due and legal notice of that suit, but the Merritts did not appear therein at all, and a final decree was rendered in the New York Court, in which decree all the interest of the Merritts in the stock was foreclosed. The stock in controversy was then sold under the decree of the New York Court, and was purchased by the Barge Company. From the report of the case, it appears that the Merritts in their suit brought in the State Court of Minnesota, and removed to the Federal Court, stated a good cause of action against the Barge Company, entitling the Merritts upon their statement of the facts, to a judgment for the value of the stock in controversy. After the final decree in the Supreme Court of New York City, the Barge Company was permitted to file an amended answer, and in that amended answer, set up all the proceedings had in the Supreme Court of the State of New York, and the final sale of the stock, and the purchase thereof by the Barge Company. Regardless of which suit was brought first, and without objection on the part of either party, the suit in the State Court in New York was prosecuted to a final decree first, and in that decree there was an adjudication of all the rights of the Merritts involved in their suit in the Federal Court in the State of Minnesota. The Merritts demurred to the amended answer, setting up the above defense. The demurrer was overruled, the court holding that the facts set forth in the

amended answer constituted a defense. The court held that the questions arising in the suit in the Federal Court in Minnesota had been adjudicated by the proceedings by the State Court in New York, and that that adjudication was final and binding on the Merritts in the Federal Court in Minnesota, and that they could not recover. The Court of Appeals called attention to the fact that the suit instituted in the Supreme Court of New York was an action to establish and foreclose a lien on personal property alleged to be situated in New York. The suit was, therefore, in the nature of a proceeding in *rem*. The suit of the Merritts in Minnesota was brought on the theory that the Barge Company had no lien, and that said company was liable to the Merritts for the value of the shares of stock. The Merritts did not deny that there was a practical identity of the issues in the two suits. It was stated by the Circuit Court of Appeals of the Eighth Circuit, that the Merritts conceded that the issues were identical, and further conceded that the final decree in the New York Court was a bar, provided the New York Court rightfully proceeded with the hearing and determination of the case before it. In other words, the Merritts seemed to have conceded that if the New York Court had acquired lawful jurisdiction of the subject matter, its decree was final, and binding, notwithstanding the Minnesota suit might have been brought first. Then the Court of Appeals proceeded to inquire whether the fact that the Minnesota suit was first brought precluded *the New York Court* from entertaining jurisdiction of the suit which was subsequently instituted in New York.

In the case at bar, *if* respondent had not objected in the Federal Court to the action of the petitioners in proceeding with the cause in the State Court, in that respect the case would have been similar, although vitally different. The Court of Appeals, however, as will be seen by refering to the opinion, in part based its ruling upon the fact that the New York Court actually took possession of the shares of stock located within the jurisdiction of that court. Even if that court had not taken possession of those shares of stock, that court could have proceeded with the trial, if neither party in that court raised the question, and if neither party raised the question in the Federal Court. If the Merritts, providing their suit was first filed, had gone into the Federal Court in Minnesota, and had brought an ancillary suit in Equity, to protect their Federal right in the Minnesota Court, and to preserve and protect the jurisdiction of the Federal Court in Minnesota, then an entirely different question would have been before the Federal Court in Minnesota, and also before the Court of Appeals when the case was decided. The Court of Appeals cited with approval the case of *Sharen* v. *Terry*, 56 Fed. 337. In that case the question here was determined in accordance with the contention of the respondent. However, it is a misapplication of a sound rule to urge that this Merritt case, under discussion, decides the question in the case at bar. The remarks of the court in that case, relating to the right of the parties to bring a subsequent suit, and proceed to a final decree in the subsequent suit, must be considered in connection with the facts of that case. The State Court

of New York, as well as the State Chancery Court of Arkansas, in the absence of any one raising the question, would undoubtedly have the right to proceed to a final determination of the case pending before that court. A subsequent suit may be brought, and maintained in another jurisdiction, although the same issues are involved in the second suit as those involved in the first suit, if no party to the litigation raises the question. Each court in the absence of objection will proceed to a final hearing of the controversy, pending before that court. The Merritts, as heretofore stated, did not raise the question, either in the New York Court or in the Federal Court in Minnesota. The Merritts were satisfied to let the case in New York proceed to a final decree, believing, as they did, that that court did not have jurisdiction of the controversy. In that they were mistaken.

In the case at bar (133) as is shown elsewhere respondent prayed the State Chancery Court not to proceed with the suit in that court.

Turning aside for a moment, from the principal question under discussion, this Merritt case illustrates the necessity of the rule contended for by the respondent in the instant case. In the Merritt case undoubtedly the Federal Court in Minnesota had jurisdiction of the subject matter, and of the parties. According to the court's opinion, that case was brought a few days before the suit was brought in the New York Court. The latter court, however, acquired legal jurisdiction of the parties and the subject matter. The Merritts, as stated, made no effort to preserve their Federal right, and made

no effort to prevent a final decree in the New York Court, and that court proceeded to a final decree, and that final decree was held to be a complete bar to the right of the Merritts in the Minnesota suit in the Federal Court. Applying that case to the facts in the case at bar, it is conclusive that if the petitioners are permitted to rush their suit in the State Chancery Court to a final decree, the Federal Court below in suit 439 will have nothing to decide. In other words, the decree in the Chancery Court will be an absolute bar to the right of the respondent in its action legally brought in the Federal Court. It does seem to me that the Merritt case also lacks force as an authority against the respondent for the reason that the Barge Company in the New York Court, actually brought a suit to foreclose a lien on property located within the jurisdiction of the court in New York. It would, therefore, seem that nearly everything that is said by the court in the Merritt case is *obiter*, except the holding by the court that the New York judgment was entitled to full faith and credit, and was a complete bar to the suit of the Merritts pending in the State of Minnesota. The remainder of the discussion in the Merritt case applies to the questions arising as to the validity of the New York judgment. The court held the judgment valid, and thereby held that the Merritts were barred, because the same issues had been adjudicated in the subsequent suit, but prior trial in the New York Court, no party having made any objection to such proceedure.

The petitioners also rely upon the case of *Ogden City* v. *Weaver*, 108 Fed. 564. The dissenting opinion

in the court below is also based in part upon that decision. The inapplicability of that case is shown by the quotation made from it, by Judge Lewis. See page 180 of the Transcript in the case at bar. The meaning of the language of the court, as shown in that statement, is that either court has the right to proceed in any case pending in that court. The *court* might have a right to proceed. That right does not control the Federal right of a litigant to bring and maintain his suit in a Federal Court. In the absence of some party raising the question in either court as a matter of law, as well as a matter of reason, either *court* may proceed, but not so as to violate Federal constitutional rights. However, when the right granted by the Constitution of the United States and the laws of Congress, is called in question, and whenever the procedure of a State Court is such as to deny that right, then a wholly different question is presented to the court. In the Ogden City case, the receivers of a Water Company brought suit against the City of Ogden to recover for water furnished to the city. The receiver contended that the right of recovery was based upon a contract between the City and the assignor of the Bear Lake & River Water Works & Irrigation Company. The principal defense made by the City was that the contract under which the water was furnished was in excess of the city's power, and for that reason, invalid.

While not shown in the statement of facts made by the court, it does appear in the court's opinion that counsel for the City of Ogden insisted that a decree rendered in the State Court was not a final decree, and did not

determine the rights of the plaintiff and the defendant in the present suit. The Court of Appeals examined the decree of the State Court, and held that that decree was not an adjudication of the receiver's rights, and that said decree in the State Court could not be pleaded in bar of the action in the Federal Court, brought by the receiver. It was held by said Court of Appeals that the State Court determined a single question, and that was that the contract between the City of Ogden and John R. Bothwell was invalid. After the court had adjudged said contract invalid, a master was appointed to state an accounting. At the time of the trial of the case in the Federal Court, the proceeding in the State Court seems still to have been pending. It was then insisted by the City of Ogden that if the decree was not final the mere pendency of the case in the State Court should have induced the Federal trial court to suspend all proceedings until the action in the State Court was finally heard and determined. If that principle is to be followed, then the petitioners should not attempt to prosecute their suit in the State Court, as they are trying to do, but should await the final determination of the case in the Federal Court. The City of Ogden, however, did not claim in that case its Federal right, or any Federal right to bring and maintain a suit in the Federal Court. It did not contend, as does the respondent in the case at bar, that under Section 2 or Article III of the Constitution of the United States, and under the Judicial Code, the respondent is entitled to bring and maintain a suit in the Federal Court, and to have the jurisdiction of the Federal Court preserved and pro-

tected, so that that court may make a final decree and adjudge the rights of the parties to that litigation. No such contention was made by either the plaintiff or the defendant in said Ogden City suit. The question involved apparently related to the right of a court without proper objection being made by either side, to proceed with any cause that may be pending before it. Therefore, instead of that case being an authority in support of the contention of the petitioners, it seems to be the reverse. In discussing the question, the court said:

> "Whether the contract is valid or invalid can be determined in an action at law, as well as in equity, and a non-resident suing in a Federal Court is entitled to have the question determined by that tribunal, unless it has been finally adjudicated by some other court in an action to which he was a party."

That language seems to recognize a right of a non-resident plaintiff to enforce his remedy in a Federal Court.

The minority opinion in the court below also relies upon the case of *B. & O. R. R.* v. *Wabash R. R. Co.*, 119 Fed. 678. That was a case decided by the Circuit Court of Appeals of the Seventh Circuit. That case seems to the writer of this brief to be in support of the contention of the respondent. Quoting from the first paragraph of the syllabus, this language appears:

> "It is the settled rule that when a State Court and a Federal Court may each take jurisdiction of a matter, the tribunal whose jurisdiction *first at-*

taches holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted."

It is then said that the rule does not apply to actions strictly *in personam*. The facts in the case do not bring it within the rule contended for by the respondent in the case at bar. The B. & O. R. R. and the B. O. & C. Railroad Company owned a track. The Wabash desired a right of way for the construction of a railroad over the railroad of the B. & O. and the other company. The B. & O. and the Wabash were unable to agree. The Wabash therefore proceeded under the Indiana Law to acquire by condemnation a right of way. The suit was brought in the State Court, and a right of way condemned. Both sides appealed to the Court of Appeals in Indiana. At the time of the bringing of the present suit, the said appeals were still pending. The Wabash Company filed a bill in the United States Court for the District of Indiana, seeking to enjoin the B. & O. from resisting the making of the grade crossing. The third railroad company intervened in that suit, and requested to be made a party. The intervening railroad company was a corporation organized under the Laws of Indiana. The court refused to permit the third railroad to intervene, and enjoined the B. & O. from interfering with the rights of the Wabash. *Neither the Wabash nor the B. & O. nor the other railroad involved, ever claimed that a Federal right to bring and maintain a suit in a Federal Court was involved.* The remedy sought in the

Federal Court apparently was based upon the adjudication in the State Court, and was not in conflict with what was done in the State Court, but was in harmony with the same. Hence, no such question as that involved here in any way arose, was argued, discussed or decided by that court in that case.

This completes the discussion of the cases relied upon in the minority opinion.

If the case of *Holmes County* v. *Burton Construction Company*, 272 Fed. 565, is in point, said case should not be followed. I do not regard the case as in point. *It was not urged in that case that the proceeding in the State Court denied the non-resident of the Federal right. It was not argued or insisted in that case that the proceeding in the State Court deprived the Federal Court of its power and authority over a cause where it had first secured jurisdiction of the parties.* On the facts stated in that case the question involved here was not decided at all.

Petitioners rely upon *Barber Asphalt Co.* v. *Morris*, 132 Fed. 948. It is submitted that the doctrine of that case supports the respondent. The opinion was by Judge Sanborn, and the subject discussed was *abatement*. The action was a mandamus to compel the District Judge to proceed with the trial of the cause. The court considered the case as though the Barber Company "had first brought actions to collect its debt in the State Court, and had afterwards brought one in the Federal Court to enforce the same obligation."

In the case of *Gates* v. *Bucki*, 53 Fed. 961, the question here involved did not arise at all. That was a suit by attachment.

In *Zimmerman* v. *SoRelle*, 80 Fed. 417, the controlling principle of the case seems to be with the respondent. Each of the suits involved in that case was for the purpose of quieting title to land. Apparently neither took possession of the land. Each had jurisdiction of the parties. In discussing the subject, the court said:

> "But when, as in the case at bar, two suits in Chancery are pending between the same parties, one in a State and the other in a Federal Court, the object of both suits being to quiet the title to the same tract of land, *that court which first acquired jurisdiction by the issuing and service of process, must be allowed to proceed with the hearing and determination of the case;* and so long as the first suit remains pending and undetermined, *the action of the court in which it is pending should not be embarrassed by proceedings taken or orders made in the case which was last brought.*"

Another case upon which petitioners rely is *Green* v. *Underwood*, 86 Fed. 429. The same doctrine indicated in the above quotation from the other case is declared to be the law in the Underwood case.

Petitioners also rely upon the case of *Bunkerhill & Sullivan Mining & Concentrating Co.* v. *Shoshone Mining Co.*, 109 Fed. 504. That case is really one involving the doctrine of *abatement*. In that case the suit was brought in the State Court first. For that reason the

Federal Court apparently refused to proceed. That should have been done by the State Court in the case at bar. It probably would have been done had it not been for the conduct of the petitioners.

The petitioners also rely upon *City of Mankato* v. *Barber Asphalt Paving Co.*, 142 Fed. 340. The doctrine of that case seems to be with the respondent. The court said:

> "Application of any other rule than that just announced as is seen by the history of this case, *might not only deprive a non-resident suitor of his right to invoke the jurisdiction of the Federal Courts, but might subject him to delay and embarrassment, which without fault on his part, would seriously damage him, if not utterly defeat his right of recovery.*" (Italics mine.)

Such has been the painful result in the instant case, irreparable loss, damage and delay resulting from petitioners' wrongful efforts to force this case out of the Federal Court.

Petitioners also rely upon the case of *Woren* v. *Witherbee*, 240 Fed. 1013. Quoting from *Harkgrader* v. *Wadley*, 172 U. S. 148, that court said:

> "When a State Court and a Court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

In addition to that, the same case held that an adjudication of the same matter in the suit subsequently brought might be pleaded in bar to the other suit. In other words, if the parties permit the subsequent suit to be tried without raising the question raised here, the decree in the second suit bars any further proceeding in the first suit.

Petitioners also rely upon *In re. Lasserot,* 240 Fed. 325. It does seem to the writer of this brief that that case strongly supports the contention of the respondent. The same is true of the case of *McClellan* v. *Carland,* 217 U. S. 268.

In most of the cases cited by the petitioners, as heretofore shown, the questions decided relate to abatement (see page 40 of Petitioners' Brief).

III.

After a non-resident of Arkansas has lawfully brought a suit in the Federal Court as provided in the constitutional laws of Congress, on the subject, against a citizen of Arkansas for breach of a contract by said citizen of Arkansas, can said citizen of Arkansas remove the cause from the Federal to the state court thereby depriving the former of its lawfully acquired jurisdiction by bringing in the state court a suit for damages on the same contract, leaving nothing to be determined in the Federal Court, if the suit in the State Court is decided first?

It is deemed unnecessary to discuss that question further, as the reasons underlying it are given under the previous paragraph.

IV.

Does the action of the citizen of Arkansas, in making the sureties on the bond parties in the State Court, when one of said sureties, the Surety Company, the real surety (the United States Fidelity and Guaranty Company) is a non-resident of Arkansas, and hence could be easily made a party in said citizen's cross complaint in the Federal Court, in any manner lessen the right of the non-resident plaintiff to bring and maintain his suit in the Federal Court?

It is respectfully submitted that, for the reasons heretofore given, this question must be answered in the negative. The petitioners' construction of the bond as shown by their conduct and their language, is that it is a surety or guaranty, and that said petitioners must first establish a right of action against the principal. In the answer in this case (11) it is asserted by petitioners that a surety bond for $300,000.00 was furnished *"conditioned that if the said Burke Construction Company should well and truly perform the said contract, and in all respects comply with the terms and conditions of said agreement which was made a part of said bond, then in that event the said bond should be null and void; otherwise* to remain in full force and virtue." Clearly that shows that petitioners regarded the bond as one of surety or guaranty (see page .... of this Brief).

The case of *English* v. *Shelby*, 116 Ark. 212, these statutes and transactions being Arkansas transactions, on this subject is controlling. In addition to that, the court

should not overlook the fact that the petitioners had the absolute right to make the real surety, the United States Fidelity & Guaranty Company, a party defendant in their cross complaint in Suit No. 439, and thus recover against that solvent surety any liability that might first be established against the respondent. The petitioners show in their said answer (11) that the said bond as described by them, was accepted and approved by them.

Again, on page 12, the petitioners refer to the bond as imposing an obligation on the surety *to see that the contract was carried out*. That of itself shows that the obligation of the bond is a secondary obligation.

On the same page petitioners allege "that they had the right to bring suit upon said bond for the collection of the damages which would be found by the Chancery Court of Miller County, Arkansas, in a settlement of all the issues and matters involved between the Burke Construction Company and this defendant." That is a frank, clear and plain admission that the trial of the case in the State Chancery Court will settle every controversy, and hence will deny to the respondent its right to adjudicate its case in the United States Court, and also that the alleged liability against the surety is contingent (see page ...., *supra*).

V.

Do the facts in this cause bring it within the principles above indicated and within the rules of this court in Looney vs. Eastern Texas Railroad Company, 247 U. S. 214, where this court said: "The use of the writ of injunction by Federal Courts first acquiring jurisdiction over the parties, or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties is familiar and long established practice."?

The facts heretofore set forth in this brief, show that that question should be answered in the affirmative.

VI.

Does this record show that the purpose of the petitioners in bringing suit No. 692 was to prevent the trial of respondent's case in the United States Court, and thus deprive respondent of its constitutional right to try its case in the United States Court and that court of its jurisdiction?

It is respectfully submitted that the undisputed evidence in this record conclusively shows that the object of the petitioners in bringing the suit in the State Court was to deny to the respondent a right to a trial in the Federal Court. In the motion of petitioners to modify the injunction in this cause (164) petitioners refer to the case of *Burke Construction Company* v. *Paving Improvement District No.* 5, 120 Ark. p. 435. As is shown by the record in this cause, the Chancellor who tried that case is the same Chancellor where suit No. 692 was

brought (131). The bringing in of that case into this record shows a motive apparently on the part of the petitioners. The said Chancellor found the issues largely in that case against the appellant, the Burke Construction Company. The Supreme Court reversed the decision of the Chancellor, and allowed appellant a recovery amounting to $10,500.00 more than the appellant was allowed by the court below. The appellant believed that it was entitled to still greater sums, but on the findings of fact, made by the Chancellor in the court below, the Supreme Court did not permit a recovery for any greater sum. That case might have been a reason for the pressing of suit No. 692 in the State Chancery Court, where the same Chancellor presided, and it might have been a good reason causing the respondent to desire its right of trial in the Federal Court duly preserved.

In addition, it is alleged in the complaint herein, that the petitioners were instrumental in having the Secretary of State, Tom J. Terral, attempt to annul the license of the respondent to do business in Arkansas. The answer of the petitioners on that subject is very significant. The answer denies that petitioners took any *wrongful* action in that case of *Terral* v. *Burke Construction Company* (15). It is asserted in the answer (15) that the petitioners did not *wrongfully* persuade the Secretary of State, and further that *the respondent had no legal right* to do business in Arkansas. *It is then alleged that the respondent had broken its contract with the State of Arkansas, and had sued the petitioners, citizens of the State of Arkansas, in a Federal Court.*

What a serious offense that was as petitioners seem to think is shown by their aggressive but futile action to have respondents license taken, making it to suffer the loss of thousands of dollars worth of property and contract rights which were then in Arkansas. The answer of petitioners then states (16): "These defendants had the right then and still have, as they believe, to insist *upon compliance with said law by said plaintiff*, and said Secretary of State *then had and still has*, as defendants believe, *the right to proceed to cancel the license of said plaintiff*." That seems to be an admission that the attempt to cancel the license was the act of the petitioners. Petitioners prosecuted that case to this court, and this court affirmed the decision of the lower court, thus showing that these petitioners were engaged in a wrongful act toward the respondent. The petitioners then in their answer admit that suit No. 692 was a *subsequent* suit, and attempt to justify it on the ground that they had a *legal* right to bring it. A brief reference to the pleadings, however, will show the principal purpose in bringing said suit. Petitioners had failed in their effort to have respondent's license forfeited. After waiting thirty days, they bring a suit in the State Court. That case is removed to the Federal Court by petition and bond filed on April 9. On May 13, the first day of the court, petitioners filed a motion to remand that cause. At their request, the cause is remanded. Immediately, notwithstanding the prior pendency of the suit in the Federal Court, they proceed to have orders made on their motion in the State Court. The answer (133)

of the respondent in the State Court, sets up the prior pendency of the suit in the Federal Court, and respectfully requests the State Court to proceed no further in the cause. The record does not show any specific ruling on that, but the record does show that the court *proceeded.*

On page 133 of the transcript the respondent alleges that the suit against the sureties is prematurely brought, and further alleges that *the petitioners having taken possession of the plant, property and machinery, and having started upon the completion of the work, could have no cause of action until the work was completed, and hence could have no cause of action because it could not be told what amount petitioners should recover against respondent.* In addition it is alleged (133) that respondent has brought suit in the United States District Court, and that the same issues are involved in that case as in suit No. 692, and that the said court should not proceed any farther in said suit No. 692, but that the Federal Court should be permitted to try said cause. The date of the filing of that answer is not shown. Petitioners contend, however, that it was filed about July 1, 1920. On May 25, and June 2nd and June 17, the State Chancery Court *proceeded* to make orders in that court, *notwithstanding the case had been set for trial in the Federal Court by a prior order, which trial was fixed for July 20th,* and which order of setting was made by the Federal Court on May 17, 1920. On August 31, and while the papers were being prepared to present the questions to the Circuit Court of Appeals of the Eighth

Circuit, and before they could be prepared, the State Chancery Court (131) proceeded to make an order, directing that the parties *proceed* with the depositions, and that said depositions be taken *in open court before the Chancellor*. Under Section 1288, as counsel for the respondent construes it, the said cause in the Chancery Court could not come to trial before October 1st. Notwithstanding that, the order requiring depositions to be taken is made on August 31.

These facts, and the others heretofore stated show, it is respectfully submitted, that the petitioners, in filing the suit No. 692, were simply trying to deprive the Federal Court of its rightful jurisdiction previously acquired.

VII.

The purpose of petitioners in bringing suit No. 692 in the State Chancery Court was to evade a trial in the Federal Court, and to deny to respondent a right granted to it by the Federal Constitution.

It is deemed unnecessary to discuss this point, as it is in effect involved in the preceding ones.

It is respectfully submitted that the cause should be affirmed.

JAMES B. McDONOUGH,
Counsel for Respondent.

KLINE ET AL., AS THE BOARD OF IMPROVEMENT OF PAVING IMPROVEMENT DISTRICT NO. 20, OF THE CITY OF TEXARKANA, ARKANSAS, *v.* BURKE CONSTRUCTION COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 81. Argued October 19, 20, 1922.—Decided November 20, 1922.

1. Where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect would be to defeat or impair the jurisdiction of the federal court. P. 229.
2. But where the actions in both causes are *in personam*, seeking only money judgments, jurisdiction in the one is not affected by the other, and there is no basis for such an injunction. P. 230.
3. The right of a citizen to prosecute his cause against a citizen of another State in the federal court is not a right granted by the Constitution; and it affords no ground upon which that court may assume jurisdiction to enjoin the defendant from prosecuting a counter action, on the same contract, in a state court. P. 233.

271 Fed. 605, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals, reversing a decree of the District Court, which denied an

injunction, in a dependent suit brought by the present respondent to restrain the petitioners from prosecuting a suit in a state court.

Mr. William H. Arnold and *Mr. Frank S. Quinn*, with whom *Mr. William H. Arnold, Jr.*, and *Mr. David C. Arnold* were on the brief, for petitioners.

Mr. James B. McDonough for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Burke Construction Company, a corporation organized under the laws of the State of Missouri, brought an action at law against petitioners in the United States District Court for the Western District of Arkansas on February 16, 1920. The jurisdiction of that court was invoked upon the ground of diversity of citizenship, the petitioners being citizens of the State of Arkansas. The action was for breach of a contract between the parties, whereby the Construction Company had engaged to pave certain streets in the town of Texarkana. A trial was had before the court and a jury which resulted in a disagreement.

Subsequent to the commencement of the action by the Construction Company, viz., on March 19, 1920, petitioners instituted a suit in equity against that Company in a state chancery court of the State of Arkansas, upon the same contract, joining as defendants the sureties on the bond which had been given for the faithful performance of the contract. The bill in the latter suit alleged that the Construction Company had abandoned its contract and judgment was sought against the sureties as well as against the company. The bill asked an accounting with reference to the work which had been done and which remained to be done under the contract, and prayed judgment in the sum of $88,000.

In the action brought by the Construction Company the petitioners filed an answer and cross complaint, setting up, in substance, the same matters which were set forth in their bill in the state court. In the equity suit the Construction Company filed an answer and cross complaint, setting up the matters charged in its complaint in the action at law. Thus the two cases presented substantially the same issues, the only differences being those resulting from the addition of the sureties as parties defendant in the equity suit. Both actions were *in personam*, the ultimate relief sought in each case being for a money judgment only.

The equity suit was removed to the United States District Court upon the petition of the Construction Company upon the ground that the Company and the petitioners were citizens of different States and that the controversy between them was a separable controversy, and upon the further ground that a federal question was involved. Petitioners moved to remand. The District Court sustained the motion and the equity suit was thereupon remanded to the State Chancery Court, where it is still pending.

After the mistrial of the action at law in the United States District Court, the Construction Company filed a bill of complaint as a dependent bill to its action at law, by which it sought to enjoin the petitioners from further prosecuting the suit in equity in the State Chancery Court. The United States District Court denied the injunction and an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit. That court reversed the decision of the District Court and remanded the case with instructions to issue an injunction against the prosecution of the suit in equity in the State Chancery Court. From that decree the case comes here upon writ of certiorari.

Section 265 of the Judicial Code provides: "The writ of injunction shall not be granted by any court of the

United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." But this section is to be construed in connection with § 262, which authorizes the United States courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." See *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Lanning* v. *Osborne*, 79 Fed. 657, 662. It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is *in rem* the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction.

This Court in *Covell* v. *Heyman*, 111 U. S. 176, 182, said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same sys-

tem, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

And the same rule applies where a person is in custody under the authority of the court of another jurisdiction. *Ponzi* v. *Fessenden*, 258 U. S. 254.

But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. *Stanton* v. *Embrey*, 93 U. S. 548; *Gordon* v. *Gilfoil*, 99 U. S. 168, 178; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 339; *Insurance Company* v.

Brune's Assignee, 96 U. S. 588, 592; *Merritt* v. *American Steel-Barge Co.*, 79 Fed. 228; *Ball* v. *Tompkins*, 41 Fed. 486; *Holmes County* v. *Burton Construction Co.*, 272 Fed. 565, 567; *Standley* v. *Roberts*, 59 Fed. 836, 844–5; *Green* v. *Underwood*, 86 Fed. 427, 429; *Ogden City* v. *Weaver*, 108 Fed. 564, 568; *Zimmerman* v. *So Relle*, 80 Fed. 417, 419–420; *Baltimore & Ohio R. R. Co.* v. *Wabash R. R. Co.*, 119 Fed. 678, 680; *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 146 Fed. 337, 340; *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 171 Fed. 43; *Woren* v. *Witherbee, Sherman & Co.*, 240 Fed. 1013; *Stewart Land Co.* v. *Arthur*, 267 Fed. 184.

In *Baltimore & Ohio R. R. Co.* v. *Wabash R. R. Co.*, *supra*, the Circuit Court of Appeals for the Seventh Circuit said:

"It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted. . . . The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' *Covell* v. *Heyman*, 111 U. S. 176. The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. *Farmers' Loan & Trust Co.* v. *Lake Street El. R. Co.*, 177 U. S. 51; *Merritt* v. *Steel Barge Co.*, 24 C. C. A. 530, 79 Fed. 228, 49 U. S. App. 85. The rule is limited to

actions which deal either actually or potentially with specific property or objects. Where a suit is strictly in personam, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law. *Stanton* v. *Embrey*, 93 U. S. 548."

In *Stewart Land Co.* v. *Arthur*, *supra*, where the plaintiff sued the defendant upon two checks and a promissory note in the United States District Court, and subsequently brought an action against him upon the same instruments in a state court and an injunction was sought against the latter action, the Circuit Court of Appeals for the Eighth Circuit disposed of the matter as follows:

"In the Iowa case there was no custody of property which might lawfully be protected by the injunctive process. It was purely in personam. The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course."

Prior to the decision in the instant case, as an examination of the foregoing authorities, and others which might be added, will show, the rule was firmly established that the pendency in a federal court of an action *in personam* was neither ground for abating a subsequent action in a state court nor for the issuance of an injunction against its prosecution. In the case now under consideration, however, the court below held otherwise, upon the ground

that: "By the Constitution of the United States (article 3, § 2, and the acts of Congress, U. S. Comp. Stat. 991) the constitutional right was granted to the Burke Company to ask and to have a trial and adjudication . . . by the federal court."

It is said further that if the second suit may be prosecuted so as to secure an adjudication in a state court before the action of the federal court can be adjudicated, then the federal court's adjudication would be made futile because before it is rendered the controversy will have become *res adjudicata* by the adjudication of the state court. Such a result, it is urged, cannot be allowed because the Construction Company brought its action in the federal court in pursuance "of a grant of this right in the Constitution and the acts of Congress" and it may not be deprived of that constitutional right by a subsequent suit in a state court.

The force of the cases above cited is sought to be broken by the suggestion that in none of them was this question of constitutional right presented or considered.

The right of a litigant to maintain an action in a federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right *granted* by the Constitution. The applicable provisions, so far as necessary to be quoted here, are contained in Article III. Section 1 of that Article provides, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By § 2 of the same Article it is provided that the judicial power shall extend to certain designated cases and controversies and, among them, "to controversies . . . between citizens of different States. . . ." The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated

cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner* v. *Bank of North America*, 4 Dall. 8, 10; *United States* v. *Hudson & Goodwin*, 7 Cranch, 32; *Sheldon* v. *Sill*, 8 How. 441, 448; *Stevenson* v. *Fain*, 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor* v. *Cooper*, 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors* v. *Osbornes*, 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right. The Construction Company, however, had the undoubted right under the statute to invoke the jurisdiction of the federal court and that court was bound to take the case and proceed to judgment. It could not abdicate its authority or duty in favor of the state jurisdiction. *Chicot County* v. *Sherwood*, 148 U. S. 529, 533; *McClellan* v. *Carland*, 217 U. S. 268, 282. But, while this is true, it is likewise true that the state court had jurisdiction of the suit instituted by petitioners. Indeed, since the case presented by that suit was such as to preclude its removal to the federal jurisdiction, the state jurisdiction in that particular suit was exclusive. It was, therefore, equally

the duty of the state court to take the case and proceed to judgment. There can be no question of judicial supremacy, or of superiority of individual right. The well established rule, to which we have referred, that where the action is one *in rem* that court—whether state or federal—which first acquires jurisdiction draws to itself the exclusive authority to control and dispose of the *res*, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank. See *Heidritter* v. *Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 305. The rank and authority of the courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.

The decree of the Circuit Court of Appeals is therefore reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.